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IN THE

Supreme Court of the United States

October Term, 1960.

Nos. 537

JANE ENNIS, et al.,

Petitioners,

v.

MARY ANN EVANS, et al.,

Respondents.

And six consolidated cases.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1960.

No.

JANE ENNIS, VINCENT A. THEISEN, MARVEL O. WATSON, ROY A. WENTZ, RALPH GRAPPER HAUS, HAROLD B. ENGLISH, MEMBERS OF THE STATE BOARD OF EDUCATION;

GEORGE R. MILLER, JR., STATE SUPERINTENDENT OF PUBLIC INSTRUCTION,

Petitioners,

v.

MARY ANN EVANS, AN INFANT, BY HELEN EVANS, HER GUARDIAN *ad litem;*

OKLYN BROWN, JR., AN INFANT, BY OKLYN BROWN, HIS GUARDIAN *ad litem;*

SHIRLEY GUY, AN INFANT, BY NELSON GUY, HER GUARDIAN *ad litem;*

HERMAN MURRAY, AN INFANT, BY ELLA MURRAY, HIS GUARDIAN *ad litem;*

JACQUELINE SIMMONS, AN INFANT, AND VINCENT SIMMONS, AN INFANT, BY LILLIAN FAUST, THEIR GUARDIAN *ad litem;*

DELPHAIN SIMMONS, AN INFANT, AND SHERRY WILSON, AN INFANT, BY ALPAIN WILSON, THEIR GUARDIAN *ad litem;*

HELEN EVANS, OKLYN BROWN, NELSON GUY, ELLA MURRAY, LILLIAN FAUST AND ALPAIN WILSON,

Respondents.

OCTOBER TERM, 1960.

No.

JANE ENNIS, VINCENT A. THEISEN, MARVEL C. WATSON, ROY A. WENTZ, RALPH GRAPPER HAUS, HAROLD B. ENGLISH, MEMBERS OF THE STATE BOARD OF EDUCATION;

GEORGE R. MILLER, JR., STATE SUPERINTENDENT OF PUBLIC INSTRUCTION,

MAX R. CORDER, E. CRERAR BENNET, JR., ERNEST C. MACKLIN, GEORGE A. ROBBINS, MEMBERS OF THE BOARD OF EDUCATION OF THE MILFORD SPECIAL SCHOOL DISTRICT,

Petitioners,

v.

EUGENE HARRIS, AN INFANT, BY THOMAS HARRIS HIS GUARDIAN *ad litem*;

THOMAS HARRIS,

Respondents.

OCTOBER TERM, 1965.

No.

JANE ENNIS, VINCENT A. THEISEN, MARVEL O. WATSON, ROY A. WENTZ, RALPH GRAPPERHAUS, HAROLD B. ENGLISH, MEMBERS OF THE STATE BOARD OF EDUCATION;

GEORGE R. MILLER, JR., STATE SUPERINTENDENT OF PUBLIC INSTRUCTION,

WILBUR C. ROOT, NORMAN C. HAMSTED, HARRY WEBB, MARJORIE BAKER, MEMBERS OF THE BOARD OF TRUSTEES OF GREENWOOD SCHOOL DISTRICT NO. 91,

Petitioners,

v.

JULIE COVERDALE, AN INFANT, BY ANNIE E. COVERDALE, HER GUARDIAN *ad litem;*

LULA COLLINS, AN INFANT, BY LEWIS SMITH, HER GUARDIAN *ad litem;*

PHILLIS HAINES, AN INFANT, BY JOHN W. HAINES, HER GUARDIAN *ad litem;*

ISAAC SMITH, AN INFANT, BY IKE SMITH, HIS GUARDIAN *ad litem;*

ANNIE E. COVERDALE, LEWIS SMITH, JOHN W. HAINES, AND IKE SMITH,

Respondents.

OCTOBER TERM, 1960.

No.

JANE ENNIS, VINCENT A. THEISEN, MARVEL C. WATSON, ROY A. WENTZ, RALPH GRAPPERHAUS, HAROLD B. ENGLISH, MEMBERS OF THE STATE BOARD OF EDUCATION;

GEORGE R. MILLER, JR., STATE SUPERINTENDENT OF PUBLIC INSTRUCTION,

Petitioners,

v.

EYVONNE HOLLOMAN, AN INFANT, BY FLOSSIE HOLLOMAN, HER GUARDIAN *ad litem;*

MARY ALLEN, AN INFANT, BY CHARLES ALLEN, HER GUARDIAN *ad litem;*

JAMES HARRIS, AN INFANT, BY EDNA HARRIS, HER GUARDIAN *ad litem;*

FLOSSIE HOLLOMAN, CHARLES ALLEN, AND EDNA HARRIS,

Respondents.

OCTOBER TERM, 1960.

No.

JANE ENNIS, VINCENT A. THEISEN, MARVEL O. WATSON, ROY A. WENTZ, RALPH GRAPPERHAUS, HAROLD B. ENGLISH, MEMBERS OF THE STATE BOARD OF EDUCATION;

GEORGE R. MILLER, JR., STATE SUPERINTENDENT OF PUBLIC INSTRUCTION,

FORD M. WARRINGTON, OTIS P. CARMINE, CLARENCE J. EVANS, HOMER L. DISHAROON, JR., MEMBERS OF THE BOARD OF EDUCATION OF THE LAUREL SPECIAL SCHOOL DISTRICT,

Petitioners,

v.

DAVID CREIGHTON, AN INFANT, BY JOSEPHINE CREIGHTON, HIS GUARDIAN *ad litem;*

JOSEPHINE CREIGHTON,

Respondents.

OCTOBER TERM, 1960.

No. .

JANE ENNIS, VINCENT A. THEISEN, MARVEL C. WATSON, ROY A. WENTZ, RALPH GRAPPER HAUS, HAROLD B. ENGLISH, MEMBERS OF THE STATE BOARD OF EDUCATION;

GEORGE R. MILLER, JR., STATE SUPERINTENDENT OF PUBLIC INSTRUCTION,

ROBERT H. STAMM, IRENE F. LARRIMORE, OSCAR W. ALLEN, JR., JOHN C. RAWLINS, MEMBERS OF THE BOARD OF EDUCATION OF THE SEAFORD SPECIAL SCHOOL DISTRICT,

Petitioners

v.

MARVIN DENSON, AN INFANT, BY CLARENCE DENSON, HIS GUARDIAN *ad litem*;

PENSACOLA CAMPER, AN INFANT, BY JOYCE CAMPER, HER GUARDIAN *ad litem*;

ETHEL FOUNTAIN, AN INFANT, BY IVORY FOUNTAIN HER GUARDIAN *ad litem*;

LORRAINE PERKINS, AN INFANT, BY FRED PERKINS HER GUARDIAN *ad litem*;

ROSEMARY SMITH, AN INFANT, BY MARY LEE SMITH HER GUARDIAN *ad litem*;

ELIZABETH WILSON, AN INFANT, BY BEATRICE WILSON, HER GUARDIAN *ad litem*;

CLARENCE DENSON, JOYCE CAMPER, IVORY FOUNTAIN, FRED PERKINS, MARY LEE SMITH AND BEATRICE WILSON,

Respondents

OCTOBER TERM, 1960.

No.

JANE ENNIS, VINCENT A. THEISEN, MARVEL O. WATSON, ROY A. WENTZ, RALPH GRAPPERHAUS, HAROLD B. ENGLISH, MEMBERS OF THE STATE BOARD OF EDUCATION;

GEORGE R. MILLER, JR., STATE SUPERINTENDENT OF PUBLIC INSTRUCTION,

Petitioners,

v.

THOMAS J. OLIVER JR., AN INFANT, BY THOMAS J. OLIVER, HIS GUARDIAN *ad litem;*

LEROY ROBINSON, AN INFANT, BY MATILDA ANDREWS, HIS GUARDIAN *ad litem;*

THOMAS J. OLIVER AND MATILDA ANDREWS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

All of the above petitioners in these consolidated cases pray that a writ of certiorari issue to review the amended judgments of the United States Court of Appeals for the Third Circuit entered on August 29, 1960.

OPINIONS BELOW.

The earlier opinions of the United States District Court for the District of Delaware (referred to hereafter as the District Court) in these cases are reported at 145 F. Supp. 873, 149 F. Supp. 376, and 152 F. Supp. 886. See A1 to The latter opinion was affirmed by the United States Court of Appeals for the Third Circuit (referred to hereafter as the Circuit Court) at 256 F. 2d 688. See A32-43. The Court denied certiorari at 358 U. S. 836.

The District Court opinion directly involved appears at 172 F. Supp. 508 and its supplemental opinion at 17 F. Supp. 891. See A44-60. The Circuit Court's opinion on appeal are reported at 281 F. 2d 385 and 281 F. 2d 3 See A76-81 and A99-109.

JURISDICTION.

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254(1). The judgments of which review is sought were originally entered by the Circuit Court on July 19, 1960. See A82-95. An order denying petitions for rehearing and an amended judgment were entered on August 29, 1960. See A110-11.

QUESTIONS PRESENTED.

1. Should a United States Court of Appeals invalidate a plan for school desegregation which was formulated in good faith by a State Board of Education and approved by a United States District Court, for the reason that the Court of Appeals disagrees with the State Board's and District Court's evaluation of present and future local conditions?

2. Should the United States Court of Appeals for the Third Circuit have held that a grade-a-year plan formu

1. Petitioners' appendix at pages 1a-16a.

lated by the Delaware State Board of Education in good faith and approved by the District Court so clearly fell short of the requirements of the "deliberate speed" test set forth in *Brown v. Board of Education of Topeka*, 349 U. S. 294 (1955), as to amount to an abuse of discretion in the application of that rule, when the United States Court of Appeals for the Sixth Circuit and other District Courts, under similar circumstances, have found similar plans to be in compliance with that same test?

3. In light of the evidence in these cases demonstrating the problems to be faced in bringing the schools involved into line with the decision of this Court in *Brown v. Board of Education of Topeka*, 347 U. S. 483 (1954), is not the grade-a-year plan formulated by the State Board of Education and approved by the District Courts a better reconciliation of the conflicting equities to be dealt with than the Circuit Court's plan for the admission of all applicants on a racially non-discriminatory basis in the fall of 1961?

4. Can a State Board of Education and a United States District Court be said to have abused their discretion when they act upon estimates made in good faith concerning matters which are not susceptible to positive prediction and when the District Court retained the right to modify the plan it presently approved if experience should prove those estimates to be erroneous?

5. Should a United States Court of Appeals order the admission to public schools of all applicants on a racially non-discriminatory basis in the fall of the next ensuing school year in the absence of supporting conclusions of fact which would indicate that the academic achievement differential between Negro and White students of corresponding age will probably not create problems of such gravity that they would outweigh the advantages of such prompt desegregation?

6. Is not a State free to organize its school system as it thinks best, so long as there are no schools within its

system which refuse admission to any pupil because of race or creed or color?

7. Did not the Circuit Court err in holding that the District Court's earlier (1957) order granting plaintiffs' motions for summary judgment on the pleadings had the effect of fixing the time within which desegregation was to have to be concluded?

8. Do the nominal plaintiffs in a class action which was brought to enforce the desegregation of public schools have any right greater than, or prior to, the rights of other members of their class?

9. Should a United States Court of Appeals order integration by a specified date at all grade levels in all schools of a state where the cases under review and the proofs and proceedings below did not include any school district within the state which was already proceeding with a desegregation plan, duly approved by the State Board, which was other than the residuary plan expressly involved in these actions?

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED.

These cases involve a Plan of School Desegregation adopted by the State Board of Education of Delaware on June 18, 1959.[2] The Plan provides, *inter alia*:[3]

> "1. Commencing with the start of the fall term, 1959, and thereafter, all pupils entering Grade 1 in any public school district in the State of Delaware which has heretofore not admitted pupils under a plan

2. There is no official publication which contains regulations promulgated by the Board of Education of the State of Delaware. Petitioners are consequently unable to provide the Court with the citation called for in Rule 23(1)(d) of this Court.

3. The complete text of this Plan is set forth in the appendix to this petition at pages 63a-64a.

of desegregation approved by the State Board of Education shall be admitted on a racially non-discriminatory basis.

"2. At the beginning of each succeeding school year pupils shall be admitted to such schools on a racially non-discriminatory basis in the next higher grade until complete desegregation has been effected at a time not later than the school year beginning in 1970.

"3. Any public school district in the State of Delaware may admit pupils to additional grades on a non-discriminatory basis at an earlier time on approval of the State Board of Education.

"4. Transfers will be considered only for those pupils who are legally domiciled in Delaware. All migrants will be admitted only to ungraded classes to be established by the State Board of Education. Any child who is not legally domiciled in the district in which admission to school is sought will be considered a migrant."

These cases also involve Section 1 of the Fourteenth Amendment to the United States Constitution. That section provides:

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASES.

These seven actions were filed in the District Court by Negro students, each a resident of a segregated school district in Delaware, through their respective guardians against members of the State Board of Education (referred to hereafter as the "State Board"), the State Superintendent of Public Instruction (referred to hereafter as the "State Superintendent"), and the members of the respective local School District Boards (referred to hereafter as "local boards") for the district in which each resided. The jurisdiction of the court was invoked both under 28 U. S. C. § 1343(3), on the ground that plaintiffs sought redress for the deprivation of a right or privilege secured by the Constitution of the United States, and also under 28 U. S. C. § 1331, on the ground that the controversy arose under the Constitution of the United States and exceeded $3,000 in value [App't A9].[4]

The Complaints asked that the various rules, regulations, laws, etc., by which segregation was maintained be declared unconstitutional and that the court issue an injunction requiring the defendants to admit, on a racially non-discriminatory basis, the plaintiffs and others similarly situated to schools within the district of each defendant local board [App't A9-3].

The Answers of the defendant local boards alleged, *inter alia*, that certain local school problems regarding space, money, and state school laws, etc., presented serious practical obstacles to immediate, full compliance with the principles of *Brown v. Board of Education of Topeka*, 347 U. S. 483 (1954).[5]

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4. Appellant's appendix filed with the Circuit Court October 30, 1959 at page 9a.

5. See, e.g., District Court record C. A. 1817, Answer par. 11; C. A. 1818, Answer, pars. (6a), 11; C. A. 1820, Answer par. 11; C. A. 1821, Answer par. 11.

All seven cases were consolidated [A15]. After certain preliminary proceedings the plaintiffs moved for summary judgment against the State Board. None of the parties filed affidavits pertaining to these motions. They were granted on the basis of the unverified Complaint and Answer [A15]. The court held that the then existing system in each school district involved was unconstitutional and that the primary responsibility for devising a plan to end segregation rested with the State Board [A12-15].

The District Court's order of July 15, 1957, following this decision, contained language which appeared to counsel to declare that all twelve grades of all the schools involved must be completely desegregated seven weeks hence, or at least early that fall [A15-16]. Motions to amend the judgment were promptly filed [A17]. Thereupon, early in August of 1957, the Court called a conference of counsel, and, on the record, explained that the language apparently ordering an end to all desegregation not later than early in the fall term which was then almost upon them was only a substantive holding that the plaintiffs and their class were constitutionally entitled to prompt non-discriminatory admission and that the process of desegregation must commence with the approaching school term [A18-30]. The Court reaffirmed its order that a plan for desegregation should be submitted by the State Board to the Court within 60 days—which would be by about September 15th—but indicated that it had not gone beyond this in respect to the mechanics of implementing its decision.[6] Thereupon, the motions to amend the judgment were withdrawn [A31].

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6. The following excerpt is from the record of this conference. (The entire text of this transcript is found in petitioners' appendix pp. 18-30):

"Mr. Warrington: I am talking about the order. That order in Paragraph 3 refers specifically to the Boards that were involved in the litigation and, as your Honor has stated, the motion was not directed against those Boards.

"The Court: But, as I explained, sir, that was a declaration of the decisional law of the case. The injunctive process or the mechanics as in 5 and 6 are not directed at Paragraph 3.

The State Board appealed from the District Court decision, contending that the formulation of such a plan was not its responsibility at all, but that of the local boards. The Circuit Court affirmed the decree of the District Court [A32-43]. It did, however, vacate the portion of the District Court's order setting a date for the submission of a plan of desegregation since that date had passed during the course of the appeal [A43]. This Court denied certiorari. *Buchanan et al. v. Evans et al.*, 358 U. S. 83 (1958). The State Board then took up its responsibility.

On remand, the District Court entered an order providing, *inter alia*, as follows:

"Mr. Warrington: But it says 'no later than the beginning of or sometime early in the Fall Term of 1957.'

"The Court: That was a declaration of law as to the end of segregation.

"Mr. Warrington: I think I understand. You go on to say 'In accordance therewith the defendants are permanently enjoined and restrained from refusing admission, on account of race, color or ancestry, of respective minor Negro plaintiffs and all other children similarly situated to the public schools maintained by the respective above-mentioned school districts.'

"The Court: That again was a declaration of law.

"Mr. Warrington: Let us assume that in Milton——

"The Court: Mr. Warrington, I could not sit here in this chair and tell you to do that on September 1st or September 15th or September 23rd. That was written to fix the legality of desegregation or integration problems. The mechanics of it we have not resolved yet, and the good Lord in His heaven doesn't know when we are going to resolve them.

"Mr. Warrington: I appreciate what your Honor says. However, if the majority of the Negro pupils in the Milton District No. 8 apply for admission to the white school it would seem to me I would have to advise my Board that your order requires them not to refuse on the ground of race, color, or creed. It seems that way to me.

"The Court: I don't know whether you are a student of the Bible or not, but you can't read one thing isolated by itself. The mechanics, as I tried to explain, are in Paragraphs 5 and 6. Now, I have no idea of putting you as attorney or any of the members of your respective School Boards in contempt of Court. Maybe I wasn't artistic enough or maybe I didn't have a literary style good enough, but to me it is crystalline clear as to what I meant." [A21-22].

> "Defendant members of the State Board of Education and defendant George R. Miller, Jr., State Superintendent of Public Instruction, shall submit to this Court within one hundred twelve days from the date of this order a plan of desegregation providing for the admittance, enrollment and education on a racially nondiscriminatory basis, for the Fall Term of 1959, of pupils in all public school districts of the State of Delaware which heretofore have not admitted pupils under a plan of desegregation approved by the State Board of Education." Order of November 19, 1958, par. 3, as amended February 24, 1959 [App't A26-29].[7]

The order further required that the State Board consult with the local boards in the specified residual class of school districts in formulating the plan in question, that the State Board transmit copies of this proposed plan to each local board involved prior to the filing of the plan, that the local boards consult further with and make recommendations to the State Board, and that the State Board thereafter make any revisions in its plan which it might then regard as appropriate [A27-28].

The State Board and the State Superintendent formulated a plan pursuant to the terms of the order, and a hearing thereon was set for March 17, 1959. The State Board's plan, as duly submitted to the Court, provided for admission of pupils into the first grade on a racially nondiscriminatory basis in the fall term of 1959, in all school districts which had not theretofore adopted a plan of desegregation approved by the State Board. The plan provided that thereafter, at the beginning of each succeeding school year, pupils should be admitted to such schools on a

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7. All districts within this class are located in the primarily rural two southern counties of Delaware (Kent and Sussex). Almost all of the school districts in the northern and primarily urban county (New Castle) have been fully integrated. New Castle County is the one that includes the City of Wilmington. The Dover School District in Kent County has commenced desegregating under a different plan which was approved by the State Board and which is not involved in these suits.

racially non-discriminatory basis in the next higher grade until complete integration had been effected. Provision was also made for the earlier admission of Negro students to additional grades on a racially non-discriminatory basis with approval from the State Board. Neither the plaintiffs nor any other interested party submitted an alternative plan to the District Court [A46].

An extensive trial was held. Here, the Court heard testimony and received exhibits in these cases for the first time.

The Court, while ordering some changes [A56-60], approved the Plan substantially as proposed [A61-64]. The Court concluded that any plan providing for more immediate integration would be unwise and impracticable under the circumstances then existing in the school districts involved [A56]. This conclusion was supported by virtually undisputed evidence relating to the present layout of school districts, space, finances, equipment, teachers, health and other services, extracurricular activities, discipline, and administrative problems. This evidence is summarized in an excerpt from the State Board's Brief before the Circuit Court included in petitioners' Appendix [A65-75].[8]

The District Court's opinion singled out three basic problems for particular emphasis. First, it pointed out that many schools would be swamped at all grade levels by the school population shift which would result from total integration in the immediate future. The quality of education would consequently suffer unless sufficient time had been provided in advance for the acquisition of additional space, equipment, teaching personnel, and the funds required to make these improvements [A48-49 and A50-51].

The Court also pointed out that there would be an "emotional strain upon the whole educational system as the result of an immediate desegregation of any substantial segment of the school system" [A49]. It pointed to the

8. This summary is documented with citations to the trial transcript, e.g. (R. 14), and to the State Board's appendix filed with the Circuit Court on November 4, 1959, e.g. (47)-(60).

dence that implementation of such a plan would disrupt the education process in the schoolroom and create grave disciplinary and administrative problems. The Court concluded that the past experience of schools in southern Delaware indicated that the prejudice and resentment among high school students, quite apart from any question of outside community resistance, was sufficient to raise havoc with the educational program [A49-50 and A53-54].

In addition, the Court laid stress upon the evidence indicating that the academic achievement levels of the Negro are significantly lower than those of White students of corresponding age [A49]. This disparity was found to be slight in the first few grades, increasing proportionally and substantially in the higher grades.[9] The Court concluded therefrom that immediate integration in the higher grades would necessarily require the schools either to downgrade existing academic standards at the expense of White students or to maintain existing standards, which many of the Negro students were simply not equipped to meet [A49].[10]

Finally, the Court noted that total integration would not be feasible prior to the enactment of legislation designed to re-divide the State schools into a more orderly system of districts [A54]. It found that another prerequisite would be the imposition of higher school taxes, through local referenda, to provide the funds for the necessary expansion of faculty and facilities [A54-55].

The District Court also concluded that the State Board had acted "in the best of faith" in weighing the conflicting equities and formulating its plan [A52].

All of the local school districts to whom the plan applied admitted all Negro students who applied for admis-

[9] The Court found that serious disparities in academic achievement begin to appear at the fifth and six grade levels [A51].

[10] Because of the view which the Court took of the cases it did not reach or discuss the effect upon either Negro or White children of having the school authorities admit the Negro children into grades in the White schools which would be lower than their present grade levels in the Negro schools.

sion to the first grade in 1959 on a racially non-discriminatory basis. The plan has remained in effect, so that as of this writing Negro students are being admitted to the first two grades of these schools.

The plaintiffs appealed from the decision of the District Court. On July 19, 1960, the Circuit Court vacated the District Court judgments [A82-95] and on August 2, 1960 denied petitions for rehearing [A109]. Its judgment, as amended, directed that the court below enter an order requiring the State Board and the State Superintendent to submit to the court below, for its approval, on or before December 1, 1960, a modified plan which would provide for admission of all qualified Negro students seeking integration in all grades of the public school system of Delaware commencing with the fall term of 1961 [A110]. It directed also that the modified plan include a program for the eventual achievement of a "wholly integrated" school system [A111][1]. The court also directed that the members of the local boards be ordered to admit into their schools, commencing with the fall term of 1960, the respective individual infant plaintiffs who then sought integration [A110].

Judge Goodrich dissented from both the original judgment and the denial of the petitions for reargument [A96 and 109].

The first ground for the decision of the Circuit Court was that the original District Court order had directed the immediate desegregation of all grades of the schools in the districts involved and that the Circuit Court's review order had expressed its approval of that order. It therefore concluded that the proposed plan was at variance with the original order [A77].

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[1] While your petitioners are not entirely certain as to the meaning of the phrase "wholly integrated", they interpret the Circuit Court's opinion to direct that the Delaware school system be revised so as to eliminate the maintenance of separate schools for Negro students who do not choose to attend the schools which were formerly reserved for White pupils only.

Nevertheless, the Circuit Court proceeded further. While conceding the correctness of the lower court's finding that the State Board had acted in good faith in formulating its plan [A77 and 105], it reviewed the situation in Delaware as seen by the majority of the Circuit Court and, on the basis of the picture as they saw it, held that the defendants had "failed to exercise properly the discretion confined to them by law" [A106].

The Circuit Court did not take issue with the lower court's finding of a serious differential between the academic achievements of the Negro and the White students in the higher grades.[12] It concurred with the District Court's conclusion that the integration of a large portion of the Negro student population would require the improvement of facilities, the acquisition of new teaching personnel and the expenditure of substantial funds [A101-102]. It also acknowledged that some legislative action would be required as a prerequisite to total integration [A102].

The Circuit Court concluded, however, that the number of Negro children who would immediately seek integration would be "a comparatively small one" [A100]. In light of this finding, it held that there were no significant obstacles to the integration in all grades of all Negro students who would seek admission in the fall term of 1961 and thereafter [A100].

Both this Court and the Circuit Court have denied petitioners' application to stay the effect of the Circuit Court's amended judgment (see the Petition of Stay filed with this Court on September 1, 1959, and the order thereon) while defendants seek certiorari.

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12 The Circuit Court did find that the "disparity in intelligence between Negro and Caucasian children is not of such a degree as to prevent or even to hinder substantially their mutual desegregated education" [A79, n. 3]. This conclusion was supported by the findings of the District Court based upon the evidence pertaining to comparative I. Q. figures. The Circuit Court made no finding, however, with respect to disparities in the academic achievement levels.

REASONS FOR GRANTING THE WRIT.

1. The decision of the Circuit Court represents a departure from recent precedents of persuasive force. The United States Court of Appeals for the Sixth Circuit, *Kelley v. Nashville*, 270 F. 2d 209 (1960), cert. den. U. S. 924, having before it a similar record, and being called upon to review a District Court's approval of a grade-a-year plan of desegregation whose practical effect was similar to that of the Delaware plan, reached a conclusion opposite to the one reached by the Circuit Court. So also did the District Courts in *Bush v. Orleans Parish School Board*, No. 3630, Eastern District of Louisiana, decided May 16, 1960, and in *Ross v. President of The Board of Trustees of the Houston Independent School District*, No. 10444, Civil Action, decided August 4, 1960.

2. The decision of the Circuit Court represents a departure from the following doctrine, announced by the Supreme Court of the United States in *Brown v. Board of Education of Topeka*, 349 U. S. 294, 299 (1955):

> "Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal."

The court that "originally heard" these cases was the District Court. The Circuit Court found that the defendants had acted in good faith but, nevertheless, disagreed with the District Court with respect to local conditions and on the basis of this disagreement, reached an opposite conclusion.

3. The gradual but orderly plan of desegregation overruled by the Circuit Court is a better reconciliation of the conflicting equities to be dealt with than the action it ordered. In ordering integration in all grades of the school system within approximately a year, the Circuit Court has created problems which not only will impose grave burdens upon petitioners and the people of Delaware but will also jeopardize the academic progress of the students of Delaware, both Negro and White. This is precisely what this Court's declarations in the *Brown* cases regarding implementation of that decision were designed to prevent.

4. Whether petitioners are ultimately held to be right or wrong in contending that the District Court's decision is "better" than that of the Circuit Court, the majority second opinion can hardly be right in calling the State Board's plan so bad as to amount to an "abuse of discretion" [A106] when the Circuit Court's rejection of the plan turned largely on its disagreement with the District Court's estimate of the number of Negro students who would apply for immediate transfer, a matter which no one can predict with any certainty, and when the District Court has retained the power to accelerate the original plan if experience should demonstrate that its estimates were erroneous or that for any other reason such acceleration would be expedient. *Barson v. Cooper*, 243 F. 2d 361, 363-4 (5 Cir., 1957).

5. Even if the District Court abused its discretion in approving the plan proposed by the State Board, the Circuit Court should not have ordered admission of all applicants on a racially non-discriminatory basis in the Fall of 1961 in the absence of supporting conclusions of fact which would indicate that the academic achievement differential between Negro and White students will probably not create problems of such gravity that they would outweigh the advantages of more speedy desegregation. If the uncontradicted findings of the District Court with respect to these differentials are accepted, the plan of the Third Circuit will necessarily require that a large portion of Negro pupils entering schools

previously attended only by White students be placed in grades substantially lower than is ordinarily appropriate to their age group. Yet the Circuit Court neither denies the existence of such differentials nor suggests a solution to the obvious problems inherent in the extraordinary situation its decree would create. It may well be that this would do more harm than good for the very children whom the rule was intended to help.

6. The pertinent constitutional requirement is met when public schools no longer deny admission to a pupil because of his race or creed or color. Such has heretofore been the tenor of the decisions of this and other courts on the subject. The Circuit Court order, however, goes far beyond the requirement that schools previously attended exclusively by White students admit all qualified Negroes who apply. It directs the school authorities of Delaware to submit to the federal court within the year 1960, for court approval, a state's plan for a "wholly integrated" school system. In so doing the Circuit Court exceeded the bounds of the prerogatives of the federal judiciary in preventing a state from impairing the constitutional rights of its citizens.

7. The Circuit Court erred in holding that the District Court's original (July 15, 1957) order granting plaintiffs' motions for summary judgment directed that desegregation proceed at any stated speed, once a start had been made. The Court acknowledged on the record shortly after the issuance of that order, that "the mechanics of . . . [achieving full integration] we have not resolved yet, and the good Lord in His heaven does not know when we are going to resolve them."[13] Moreover, if the Court had

13. It is pertinent to note that on remand from the first Circuit Court proceeding, the District Court's order contained language similar to that of its original order. The Plan which was then formulated was to provide for "admittance on a racially nondiscriminatory basis, for the Fall Term of 1959, of pupils" in certain school districts. Yet the Court proceeded to hold an extensive hearing and concluded that a grade-a-year plan commencing in 1959 complied with its order.

thus expressly interpreted its order, the conclusions of the Circuit Court would still require an explanation of how the lower Court applied the "deliberate speed" standard set forth in the decisions of this Court without the benefit of any affidavits or evidence whatever pertaining to local school problems and conditions when the answers of the local boards raised these problems as an issue in regard to the appropriate relief.[14]

8. The Circuit Court erred in granting the nominal plaintiffs priority over other members of their class with respect to the date of their admission to schools previously attended solely by White students. In a class suit the persons who represent the class have no rights greater than, or prior to, those of other members of the class. Moreover, the status of the nominal plaintiffs as litigants is unrelated to any claim they might have to priority of admission over other Negro students under any orderly plan having its roots in either administrative or academic considerations.

9. Even if the Circuit Court did not err in concluding from the evidence that the State Board's plan was unacceptable and that prompt integration at all levels was feasible in the districts which were involved in these cases, it did err in ordering such integration in all Delaware schools. Under the principles set forth in *Brown v. Topeka*, 349 U. S. 294 (1955), the function of the Circuit Court was to review a plan formulated by local authorities and reviewed by the District Court. Other plans approved by the State Board under which any other schools were in the process of desegregation were not under review in these suits and should be excluded.

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14. Even if these facts do not clearly demonstrate that petitioners were correct in their interpretation of the original order, they submit that they should not be foreclosed from securing a review by this Court on the merits of the State Board's plan when the record is at best so ambiguous that the District Court on remand concurred in petitioners' interpretation.

CONCLUSION.

Because of the impact of the Circuit Court's opi[nion] the school system of the State of Delaware, this [Court's] decision on this petition is vital to the school auth[orities] and the people of Delaware.

Because it deals with questions vital to the decisi[ons] boards of education, legal officers of the states, a[nd] courts in many areas of the United States, it should b[e] helpful to them as well.

For the reasons herein set forth, this petition [for] writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX TO PETITION.

OPINION OF JUDGE WRIGHT IN BRENDA EVANS, ET AL. v. MEMBERS OF THE STATE BOARD OF EDUCATION, STATE SUPERINTENDENT OF PUBLIC INSTRUCTION, MEMBERS OF THE BOARD OF TRUSTEES OF CLAYTON SCHOOL DISTRICT NO. 119.*

WRIGHT, *District Judge*.

This is a class suit brought pursuant to Rule 23(a)(3) of the Federal Rules of Civil Procedure, 28 U. S. C. All of the plaintiffs are among those classified as "colored", of Negro blood and ancestry, and are residents of Clayton, Delaware. The defendants are the members of the State Board of Education, the Board of Trustees of Clayton School District No. 119 and the State Superintendent of Public Instruction.

The complaint alleges plaintiffs "* * * by reason of their residence, except for their race, color and ancestry, would be acceptable by defendants for attendance at the public school in Clayton School District No. 119."[2] The

* Opinion handed down November 9, 1956 reported in 145 F. Supp. 873.

1. "Rule 23. * * * (a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is:

* * * *

"(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

2. Par. 3 of the Complaint.

complaint further charges that in response to a petition addressed to the defendants, as members of the Board of Trustees of the Clayton School District, No. 119, "* * * take immediate steps to reorganize the public school system on a racially nondiscriminatory basis and to eliminate racial segregation in said school,"[3] said defendants officially stated they had no plan for desegregation.[4] The failure and refusal of the Board of Trustees of the Clayton School District to reorganize the public school of the school district on a racially nondiscriminatory basis was called to the attention of the defendant members of the State Board of Education, who were requested to immediately desegregate the public school.[5] On March 15, 1956 the defendant members of the State Board of Education, by official act, unanimously refused to comply with the plaintiffs' request to desegregate said public school.[6]

Some of the defendants, namely, the members of the Board of Trustees of Clayton School District No. 119, have moved to dismiss the complaint as to them on the grounds (1) the complaint fails to state a claim against the defendants upon which relief can be granted, and (2) this court lacks jurisdiction over the subject matter.

[1-3] The defendants urge the complaint fails to state a claim upon which relief can be granted because there is absent any allegation of the non-existence of administrative impediments to full faith compliance with the constitutional principles set forth by the Supreme Court in the two *Brown* decisions.[7] Omission of this allegation is fatal, accordingly

3. Par. 5 of the Complaint.
4. Par. 6 of the Complaint.
5. Par. 7 of the Complaint.
6. Par. 8 of the Complaint.
7. Brown v. Board of Education of Topeka, 1954, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873, hereinafter referred to as the first Brown case; Brown v. Board of Education of Topeka, 1955, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083, hereinafter referred to as the second Brown decision.

to defendants, because they read the second *Brown* decision as conditioning the right of a Negro to attend a public school without regard to racial considerations.

Defendants misapprehended the meaning of the two *Brown* decisions. The first *Brown* decision supplied an unqualified affirmative answer to the question of whether "segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of a minority group of equal educational opportunities".[8] The Supreme Court expressed its holding in the following manner:

> "* * * we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."[9]

In the second *Brown* decision, the Supreme Court referred to the first *Brown* case as a declaration of "the fundamental principle that racial discrimination in public education is unconstitutional".[10] After incorporating the opinion in the first *Brown* decision by reference into the opinion of the second *Brown* decision, the Supreme Court indicated the subject matter of the second opinion was to determine "the manner in which the relief is to be accorded."[11] Therefore, the second *Brown* decision cannot be construed as conditioning the constitutional right set forth in the first *Brown* case. Rather, the second *Brown* decision must be read as establishing a standard as to what constitutes a good faith implementation of the governing constitutional principles set forth in the first *Brown* decision. Not only do the constitutional principles set forth in the first *Brown*

8. 1954, 347 U. S. 483, at page 493, 74 S. Ct. at page 691.
9. Id., 347 U. S. at page 495, 74 S. Ct. at page 692.
10. 1955, 349 U. S. 294, at page 298, 75 S. Ct. at page 755.
11. Ibid.

decision remain unqualified, but, the defendants also have the burden of advancing reasons justifying delay in carrying out the Supreme Court ruling.[12] It would be illogical to hold plaintiffs' complaint must set forth facts which defendants will have the burden of proving.

[4, 5] The second objection of defendants goes to the jurisdiction of this court over the subject matter of the complaint. Jurisdiction is founded upon 28 U. S. C. § 1331 and 1343. 28 U. S. C. § 1331 provides:

> "§ 1331. Federal question; amount in controversy
>
> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States. June 25, 1948, c. 646, 62 Stat. 930."

The pertinent portion of 28 U. S. C. § 1343 provides:

> "§ 1343. Civil rights
>
> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> • • •

12. "* * * the [inferior] courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. *The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date.* To that end the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems." (Emphasis added.) Brown v. Board of Education of Topeka, 1955, 349 U. S. 294, at pages 300-301, 75 S. Ct. 753, at pages 756, 99 L. Ed. 1083."

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. June 25, 1948, c. 646, 62 Stat. 932."

The jurisdiction of this court, invoked under the civil rights jurisdictional statute, 28 U. S. C. § 1343, is questioned by the defendants on the theory that when the Board of Trustees of Clayton School District No. 119 officially stated they had no plan for desegregation they were not acting "under color of any State law". This conclusion is unsound and can only be reached by traveling a tortuous path of conceptualistic reasoning.

The local school boards are a legislative creation of the State of Delaware.[13] The State Board of Education has determined as a matter of general policy (1) "that any steps toward integration must be embodied in a plan to be devised by the local board", and (2), "that any such plan must be submitted to the State Board for consideration and approval".[14] Regulations of the State Board of Education have the force and effect of law.[15] A plan of integration cannot be formulated by the defendants as individuals. Any action taken by the individual defendants relative to the integration problems of Clayton School District No. 119 is possible only because by virtue of State law they are the duly and legally constituted Board of Trustees of the Clayton School District. Thus the defendants' alleged failure to formulate a plan for integration must be considered to be done under color of State law.[16]

13. 14 Del. C.

14. Steiner v. Simmons, Del. 1955, 111 A. 2d 574, at page 582.

15. Id., 111 A. 2d at page 583.

16. Cf. Ex parte Commonwealth of Virginia, 1879, 100 U. S. 339, at page 347, 25 L. Ed. 676: "Whoever, by virtue of public posi-

Since the court has jurisdiction under 28 U. S. C. [illegible] it is unnecessary to determine whether the court would have jurisdiction under 28 U. S. C. § 1331. Accordingly, that question is left undecided. The defendants' motion to dismiss is denied.

An order in accordance herewith may be submitted.

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tion under a State government, deprives another of property, liberty, without due process of law, or denies or takes away the protection of the laws, violates the constitutional inhibition, and acts in the name and for the State, and is clothed with the power, his act is that of the State."

In Iowa-Des Moines National Bank v. Bennett, 1931, 284 U. S. 239, at page 246, 52 S. Ct. 133, at page 135, 76 L. Ed. 265, it was said: "When a state official, acting under color of state authority invades, in the course of his duties, a private right secured by the Federal Constitution, that right is violated, even if the state law not only exceeded his authority but disregarded special commands of the state law."

Finally, it has been stated, "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." United States v. Classic, 1941, 313 U. S. 299, at page 326, 61 S. Ct. 1031, at page 1043, 85 L. Ed. 1368.

OPINION OF JUDGE LEAHY IN BRENDA EVANS ET AL., PLAINTIFFS v. MEMBERS OF THE STATE BOARD OF EDUCATION, STATE SUPERINTENDENT OF PUBLIC INSTRUCTION, MEMBERS OF THE BOARD OF TRUSTEES OF CLAYTON SCHOOL DISTRICT NO. 119, DEFENDANTS.

Civ. A. No. 1816.

March 6, 1957.

LEAHY, *Chief Judge*:

This cause arises on plaintiffs' motion for summary judgment. A motion to dismiss was denied in D. C. Del., 145 F. Supp. 873. The material facts essential to this motion present no genuine issue. Plaintiffs are of Negro ancestry, citizens of the United States and of the State of Delaware, residing in the community known as Clayton, in Kent County.[1] Plaintiffs have not been accepted in the public school under the jurisdiction of Clayton School District No. 119,[2] nor has the school district heretofore taken as students persons of Negro ancestry.[3] After the first *Brown* decision by the Supreme Court on May 17, 1954,[4] the State Board of Education adopted on June 14, 1954, certain regulations calling on the local districts for proposed plans for desegregation to be submitted for review. On August

1. Complaint, par. 3 and Affidavits. Answer, Members of State Board of Education hereinafter referred to as State Board and State Superintendent of Public Instruction hereinafter referred to as State Superintendent, par. 3.

2. Complaint, par. 3. Answer, State Board and State Superintendent, par. 3.

3. Complaint, par. 6. Answer, State Board and State Superintendent, par. 6.

4. Brown v. Board of Education, Topeka, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873.

19, 1954, and again on August 26, the State Board requ
all schools should present a tentative plan for desegregat
on or before October 1, 1954. On May 31, 1955, the Su
Court came down with its second *Brown* decision.
August 10, 1955, members of the Board of Trust
Clayton School District No. 119 were petitioned to
immediate steps to eliminate racial segregation in its
lic school.[6] By letter of February 10, 1956, the State Bo
was apprised of the failure of the Clayton School
segregate and was requested to do so.[7] The State B
by letter of March 16, 1956, made known it could not
with immediate desegregation absent joint action ini
by the Local Board.[8] The members of the Local Bo
"admit that they have as yet arrived at no plan
segregation of the Clayton School and that there
posed no reorganization thereof."[9]

Plaintiffs' prayer for relief is in the alternative: 1.
this Court issue interlocutory and permanent injun
ordering defendants to admit infant plaintiffs and all o
similarly situated to the public school in Clayton
District No. 119 on a racially nondiscriminatory ba
2. That the Local Board be required to submit to the S
Board of Education a plan for integration of that sch
providing for admittance not later than the school ter
ginning in September, 1957.

[1] The Local Board answers on several grou
They contend they are improper parties to this action s
they are not vested with the power to make or determ

5. Brown v. Board of Education of Topeka, 349 U. S. 2
S. Ct. 753, 98 L. Ed. 1083.

6. Complaint, par. 5; Answer, Board of Trustees of C
School District No. 119 hereinafter referred to as Local Board, par

7. Complaint, par. 7; Answer, State Board and State Sch
tendent, par. 7.

8. Complaint, par. 8; Answer, State Board and State Sup
tendent, par. 8.

9. Complaint, par. 6; Answer, Local Board, par. 6.

educational policy, but function only in advisory capacity, and this power can not be delegated by the State Board or altered by orders originating therein. However, the mere fact the Local Board is required only to recommend educational policy does not make the Local Board an improper party to this action. The State Board having charged the Local Board with the duty to submit a plan for desegregation, both boards are now properly before the Court.

[2] Defendant Local Board alleges "that at no time has a person of negro blood or ancestry been denied admission to the Clayton School." After the refusal of the Local Board to grant the petition of plaintiffs requesting desegregation, it would be hollow formality to require them literally to knock on the schoolhouse door.[10]

[3] The remainder of defendant Local Board's contentions relate to the propriety of granting relief at this time. The Local Board alleges if the relief requested by plaintiffs is granted now, "it will constitute a violation of the mandate of the Supreme Court of the United States, requiring the elapse of a reasonable time for the transition of segregated schools to non segregated schools." It is further alleged the load of administrative work involved, the lack of facilities or transportation, and the inadequacy of personnel and school space prevents the Clayton School from being presently operated on a non-segregated basis. Finally, it is alleged the sudden change which would occur in the present social make up of the Clayton School District would do great damage to eventual integration. But matters of defense dealing with administrative problems are, at this time, prematurely raised by the Local Board.[11]

10. See the opinion of Chief Judge Parker in Charlottesville School Board v. Allen, 4 Cir., 240 F. 2d 59.

11. In the second *Brown* decision laying the blueprint for integration, the Supreme Court indicated the procedure to be followed. "* * * the [inferior] courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. *Once such a start has been made, the courts may*

The issue here is whether or not "a prompt and reasonable start toward full compliance" has been made. Despite the fact that on May 17, on August 19, and on August 29, the State Board requested local boards to present plans on or before October 1 of that year for the integration of the public schools, no plan of any kind has been forthcoming by the Clayton School Board. And, although impressions of community dissent may stay racial desegregation for a reasonable time in order to meet local problems through good faith implementation, they can never be an instrument to color interminably the governing constitutional principles as declared by the Supreme Court. Here, there has been no prompt and reasonable start.

[4] The State Board of Education argues that the Clayton Board of Trustees is required to present its plans for integration, it should be filed with this Court instead and not with the State Board. It argues the primary responsibility for formulating a plan belongs to the Local Board, that since the rules of the State Board contemplate voluntary submission of these plans, the effect of the present litigation is to hold the Local Board answerable to this Court; and that otherwise the State Board would be placed in a difficult and unsatisfactory position resulting in confusion both to it and the entire school system. The State Board would thus be content to submit its views to this Court when requested to do so. However, while the Board may require the local boards to cope with local problems in the first instance, it should not remove itself directly from the scene because a litigant has sought the judicial arm to secure his rights. At this point in time, I see no reason for not following the usual practice set out by the State Board itself in its published rules and regulations.

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and that additional time is necessary to carry out the ruling in a flexible manner. The burden rests upon the defendants to establish such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date." (Determined. Brown v. Board of Education, 349 U. S. 294, 300, 75 S. Ct. 753, 756.)

Summary judgment is granted and an order should be submitted directing the Board of Trustees of the Paxton School District No. 119 to submit a plan for the integration of the public school to the State Board of Education, in accordance with their existing rules and regulations. Such plan by the Local Board shall be submitted to the State Board within a period of 30 days. Within 60 days the State Board of Education shall submit its plan to the Court for further instructions.

MEMORANDUM AND ORDER ENTERED BY CH
JUDGE LEAHY ON JULY 15, 1957

1. Among the several motions before the Court
plaintiffs' motion for consolidation of C. A. No.
through 1822, inclusive under FR 42(a), and plain
motion for summary judgment against the Members
State Board of Education and the State Superinte
of Public Instruction under FR 56(a).

2. The Court disposed of a previous motion of p
tiffs for summary judgment with respect to C. A. No. 1
as to which an appeal was taken to the Court of A
for this Circuit but not legally prosecuted by the L
Board, in accordance with law and the Rules of said C
of Appeals. This time for filing a plan as to this par
school district, as provided for in the order entered by
Delaware District Court was continued, pending the a
until further order of this Court. The present order w
operative as to this Local Board for its failure to p
its appeal.

3. Answers of defendant State Board and State S
intendent in all the Civil Actions pending are, in subs
similar. I find as to plaintiffs and other Negro chil
similarly situated, these answers acknowledge the exis
of racial segregation in the public schools of Delawa
and this is a deprivation of rights guaranteed und

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1. See Evans, et al. v. Members of the State Board of E
et al., D. C. Del., 149 F. Supp. 370.

2. C. A. No. 1816: Complaint, pars. 3, 6, 7, 8; Answer
3, 6, 7, 8.
C. A. No. 1817: Complaint, pars. 8, 9, 10; Answer, pars. 8
C. A. No. 1818: Complaint, pars. 3, 7, 8; Answer, pars.
C. A. No. 1819: Complaint, pars. 3, 6, 7, 8; Answer, par
7, 8.
C. A. No. 1820: Complaint, pars. 3, 7, 8; Answer, par
C. A. No. 1821: Complaint, pars. 3, 7, 8; Answer, par
C. A. No. 1822: Complaint, pars. 3, 7, 8; Answer, par

Federal Constitution and so declared inviolate by the Supreme Court.[3]

4. The State Board of Education adopted in the summer of 1954 regulations requiring the local school Boards to submit to the State Board plans for racial desegregation in the public schools. These regulations, especially as they affected the local Boards, had binding force throughout the State of Delaware.[4] This initiated a policy then regarded feasible. But, it is also manifest, the local Boards, in Kent and Sussex Counties, in general, have not begun to comply with these regulations. The regulations of the State Board cannot be permitted to be wielded as an administrative weapon to produce interminable delay. In the interplay of forces resulting in continuing violation of plaintiffs' constitutional rights, these rights of Negro children must retain their vitality. They are, indeed, paramount.[5] The State Board, though not solely responsible for a solution of administrative procedures in this sociological-legal problem, must, in the final analysis, be held answerable.

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3. Brown, et al. v. Board of Education of Topeka, et al., 347 U. S. 483, 349 U. S. 294.

4. 14 Del. Code § 122. Steiner, et al. v. Simmons, et al., Del., 111 A. 2d 274, 580, 583 (per C. J. Southerland).

5. See Belton, et al. v. Gebhart, et al. and Bulah, et al. v. Gebhart, et al., 32 Del. Ch. 343, 87 A. 2d 862, aff'd in Del. Ch. 144, 91 A. 2d 137, cert. granted in 344 U. S. 891, Misc. Order in 345 U. S. 972, aff'd in 347 U. S. 483, Misc. Order in 348 U. S. 886, and aff'd and remanded in 349 U. S. 294.

At 87 A. 2d 864-865:

"Defendants say that the evidence shows that the State may not be 'ready' for non-segregated education, and that a social problem cannot be solved with legal force. Assuming the validity of the contention without for a minute conceding the sweeping factual assumption, nevertheless, the contention does not answer the fact that the Negro's mental health and therefore his educational opportunities are adversely affected by State-imposed segregation in education. The application of Constitutional principles is often distasteful to some citizens, but this is one reason for Constitutional guarantees. The principles override transitory passions."

5. The State Board of Education, from its past performance, blandly asserts it must await initial local action because the State Board "is not and can not be as conversant with local school problems as the local school Boards." The factual data contained in its Reports to the Governor of the State of Delaware refutes this. This Court readily understands the State Board, as to the problem of integration, is not as conversant with local problems as the local Boards, but the Court is in disagreement whether the State Board cannot be, or, when measured by its record of inaction in failing to negotiate a prompt and reasonable start toward full compliance, it has tried to be.

6. Clearly, it is best, in the abstract, to permit local conditions to be handled in the first instance by Local Boards for integration, as commanded by the Supreme Court of the United States. But, it is also recognized that prompt and not independent action is called for by all parties concerned. The first mandate of the Supreme Court fixed the law on this problem over three years ago, the second mandate, over two years ago. Since that time no appreciable steps have been taken[6] in the State of Delaware to effect full compliance with the law.

In conclusion, it is recognized, under the law as fixed by the Supreme Court of the United States, the right of plaintiffs to public education unmarred by racial segregation is immutable; that each state faces problems indigenous to its own circumstances; that circumstances in Delaware require racial desegregation to become a reality simultaneously throughout all communities; that the State Board

6. The Delaware State Legislature has, by statute, provided the State Board of Education with broad powers of general control and supervision, including consultation with local Boards, Superintendents, and other officers, teachers and interested citizens, determination of educational policies, appointment of administrative assistants to administer its policies, requiring reports from Local Boards, decision of all controversies involving administration of the school system, and the conducting of investigations relating to educational needs and conditions. 14 Del. Code § 121.

exercises general control and supervision over all public schools in Delaware, including the Local Boards, and has knowledge of the status of racial desegregation in those schools; that the State Board's admissions of continued racial segregation in the public schools washes away all dispute as to this issue, as raised by the Local Boards; and, that any order by this Court directed to the State Board is, *a fortiori*, directed to any Local Board over which it, in turn, has authority.

It is hereby

ORDERED AND DECREED BY THIS COURT:

1. The motion of plaintiffs to consolidate the following causes, C. A. 1816 through C. A. 1822, inclusive, be and the same is hereby granted and all pending causes in this Court are hereby consolidated for judicial decision.

2. The plaintiffs' motions for summary judgment in C. A. 1816 through C. A. 1822, inclusive, as against the Members of the State Board of Education and the State Superintendent of Public Instruction be and the same are hereby granted.

3. The minor plaintiffs in the respective cases and all other Negro children similarly situated are entitled to admittance, enrollment and education, on a racially nondiscriminatory basis, in the public schools of Clayton School District No. 119, Milford Special School District, Greenwood School District No. 91, Milton School District No. 8, Laurel Special School District, Seaford Special School District and John M. Clayton School District No. 97, respectively, no later than the beginning of or sometime early in the Fall Term of 1957.

4. In accordance therewith defendants are permanently enjoined and restrained from refusing admission, on account of race, color or ancestry, of respective minor Negro plaintiffs and all other children similarly situated to the

public schools maintained in the respective above-mentioned school districts.

5. To further obtain and effectuate admittance, enrollment and education of said minor plaintiffs and all other children similarly situated to the public schools maintained in the respective above-mentioned school districts, on a racially nondiscriminatory basis, defendant Members of the State Board of Education, having general control and supervision of the public schools of the State of Delaware and having the duty to maintain a uniform, equal and effective system of public schools throughout the State of Delaware, and defendant George R. Miller, Jr., State Superintendent of Public Instruction, shall submit to this Court within 60 days from the date of this order a plan of desegregation providing for the admittance, enrollment and education on a racially nondiscriminatory basis, for the Fall Term of 1957, of pupils in all public school districts of the State of Delaware which heretofore have not admitted pupils under a plan of desegregation approved by the State Board of Education.

6. 15 days prior to the submission of said plan to this Court, defendant Members of the State Board of Education, etc., shall send in writing by registered mail a copy of the plan of desegregation herein ordered to be submitted to this Court, together with a copy of this Order, to each member of the school board in all public school districts of the State of Delaware which heretofore have not admitted pupils under a plan of desegregation.

(s) PAUL LEAHY
Chief Judge

MOTION TO AMEND JUDGMENT.

Now Comes James M. Tunnell, Jr., counsel or "of counsel" for the above-named defendant individual school boards, and respectfully moves the Court to amend its order of July 15, 1957, by deleting the last fifteen (15) words of paragraph "3" of the said order, causing the said paragraph to end with the word "respectively", and by deleting the whole of paragraph "4", or alternatively, by amending paragraph "4" so as to require the defendants to put desegregation into effect when and as provided in the plan which the State Board of Education must file with this Court.

The reasons which the moving parties adduce in support of the said motion are as follows:

(1) In the spirit of the court's opinion to conform to a general systematic plan, applicable in all schools similarly situated rather than to order one set of schools to do one thing and another set of schools, in the same circumstances, to desegregate at a different time or in accordance with a different plan.

(2) No motion for summary judgment was made or pending against these individual defendants, laying the foundation for a definitive order against them, such as appears in paragraphs "3" and "4" of the said order of July 15, 1957.

(3) The merits of the defenses of these individual defendants have not been passed upon, and due process calls for their being accorded their "day in court".

(s) J. M. T., Jr.,
James M. Tunnell, Jr., Esquire,
Attorney for the Moving Defendants.

STATEMENT OF CHIEF JUDGE PAUL LEAHY WHICH WAS READ INTO THE RECORD AT AN INFORMAL CONFERENCE IN HIS CHAMBERS ATTENDED BY BOTH COUNSEL FOR ALL PLAINTIFFS AND RESPONDENTS RELATIVE TO PROPOSALS THAT JUDGE LEAHY'S ORDER OF JULY 15, 1957, BE AMENDED FOR CLARIFICATION OR THAT THE PARTIES HAVE REARGUMENT THE JULY 15, 1957 ORDER SHOULD NOT BECOME OPERATIVE.

Chief Judge Paul Leahy, after conference with counsel, stated he would read into the official record of the proceedings before him the following:

1. Paragraph 3 of the order of July 15, 1957, fixes as a matter of law of the United States District Court for the District of Delaware (following as it must the mandates of the Supreme Court of the United States) the right of plaintiffs and other Negro children similarly situated in the state. It establishes the terminal dates for segregation as it relates to all school boards, Local or State, in Delaware. Paragraph 4 secures this right by calling a halt to continued segregation in this state as obviously in conflict with the command for integration as established by the Supreme Court of the United States.

2. It is difficult to understand how any person could interpret the order of this U. S. District Court otherwise. It is either a refusal to recognize the semantic precision of this Court's ruling, or, an attempt to juggle words out of the pattern of their clear meaning.

3. To secure this right, Paragraph 5 of the order of this Court, dated July 15, 1957, provides the legal mechanism along lines most suitable to an orderly enforcement. Direc-

tions for compliance are aimed specifically at the State Board of Education. Any duty falling upon the local boards, any performance to which they must submit, is a result not of any entry of summary judgment as to them (motions for summary judgment as to the local boards not having been made, or, indeed even necessary to full compliance with the order of this Court), but is imposed by virtue of the laws of the State of Delaware which entrusts responsibility to the State Board of Education for the general administration and supervision of all its public schools, and which empowers the State Board to carry this out by adopting rules and regulations which have the binding force of law throughout the state on all Local Boards. Any direction this Court gives to the State Board has, by virtue of State law and the said regulations, hard meaning to all Local Boards within its jurisdiction.

4. Consequently, the whole proposed scheme in Paragraphs 5 and 6 of the order, of July 15, calls for the state administrative function to get a plan before this Court for the desegregation of its schools and admittance on a non-discriminatory basis. As stated, the Court is aware of the complex problem of carrying into effect the destruction of segregation. After hearing argument and discussion by the Attorney General and his staff and the various attorneys for the members of the local school districts, I conclude nothing is to be gained by formalistic thinking or delay. Honest action is required.

At this stage there is no thought that the judicial process, the resilient instrument that it is, is to be utilized as a threat, under the circumstances of the problems which face all of us, to be directed against any public official to comply with the law.

As honest difficulties in compliance arise, counsel for good cause to be shown may apply (as they always have the right to do) to the discretion of this Court. But, one

thing must be clear to all. Compliance with the law of the Supreme Court of the United States is inevitable. The unresolved question, left by the Supreme Court to this Court, is the duration of judicial patience. If counsel, after this statement, want to press their various motions, a date will be fixed for hearing.

(s) PAUL LEAHY,
Chief Judge

At Wilmington,
August 6, 1957.

TRANSCRIPT OF CONFERENCE BETWEEN JUDGE LEAHY AND COUNSEL FOR THE RESPECTIVE PARTIES—AUGUST 6, 1957.

The Court: I wish you gentlemen would read this statement over and then we can commence our discussion.

* * * *

The Court: Have you gentlemen finished reading? Are there any comments?

Mr. Warrington: Well, Judge Leahy, my reaction to your order is that——

The Court: It is not an order. I am just making a comment.

Mr. Warrington: I am talking about the order. That order in Paragraph 3 refers specifically to the Boards that were involved in the litigation and, as your Honor has stated, the motion was not directed against those Boards.

The Court: But, as I explained, sir, that was a declaration of the decisional law of the case. The injunctive process or the mechanics as in 5 and 6 are not directed at Paragraph 3.

Mr. Warrington: But it says "no later than the beginning of or sometime early in the Fall Term of 1957."

The Court: That was a declaration of law as to the end of segregation.

Mr. Warrington: I think I understand. You go on to say, "In accordance therewith the defendants are permanently enjoined and restrained from refusing admission, on account of race, color or ancestry, of respective minor Negro plaintiffs and all other children similarly situated to the public schools maintained in the respective above-mentioned school districts."

The Court: That again was a declaration of law.

Mr. Warrington: Let us assume that in Milton

The Court: Mr. Warrington, I could not sit here in chair and tell you to do that on September 1st or Sep ber 12th or September 23rd. That was written to ex legality of desegregation or integration problems mechanics of it we have not resolved yet, and the good L in his heaven doesn't know when we are going to r them.

Mr. Warrington: I appreciate what your Honor s However, if the majority of the Negro pupils in the M District No. 8 apply for admission to the white sch would seem to me I would have to advise my Board your order requires them not to refuse on the grou race, color, or creed. It seems that way to me.

The Court: I don't know whether you are a stud the Bible or not, but you can't read one thing isolate itself. The mechanics, as I tried to explain, are in P graphs 5 and 6. Now, I have no idea of putting you in torney or any of your members of your respective Sch Boards in contempt of Court. Maybe I wasn't a enough or maybe I didn't have a literary style good e but to me it is crystalline clear as to what I meant.

Mr. Warrington: Judge, why then was it necessa mention these different defendants that are involved in ditigation at all, as the motion was not directed aga them?

The Court: They are parties in this Court.

Mr. Warrington: I realize that, but the motion directed against the State Board of Education, and in pr[illegible]——

The Court: As I tried to suggest at page 7 of memorandum, Footnote 6, the local Boards, while they be autonomous in their own Districts, are subject to State Board of Education when with its broad power

may compile regulations for compliance with its administrative function, and that is what I am sitting here waiting for. Now, if you want to re-write my opinion, Mr. Warrington, you can do it.

Mr. Warrington: When we had the informal discussion I thought that your Honor's original suggestion that the State Board of Education should submit a plan was excellent. Of course, I had nothing to do with any time or anything like that, but my idea was that the State Board of Education was going to go into it in detail and study the situation in each local District and after they had done that they come back with a plan to submit to your Honor.

Now, as I understand this decision of the United States Supreme Court supplementing the original decision holding that segregation was illegal, they gave to the various United States District Courts the problem of working it out in detail. Now, I don't think that working it out in detail should have been imposed on your Honor. I think all of that should have been done and should be done by the State Board of Education, because then they come to the Court and submit their plan, and meanwhile they have had out with the various Local Boards what objections the Local Boards would have to their plan. Then the whole thing would come to your Honor in a concrete form to pass on, if necessary. I thought that was excellent. But instead of trying all these cases before the Court and bringing out the details of what the problem of each Local District was, it was to be done in that way; it was to be processed through the State Board of Education. I thought that was excellent.

But, of course, I probably have misinterpreted your Honor's order, but I interpreted your Honor's order to mean——

The Court: I suppose that is the fate of all judges, to have their orders misinterpreted. That is what makes lawyers. But let me ask you this question, Mr. Warrington:

I fixed the time at 60 days. How many days would you have fixed it?

Mr. Warrington: I am not questioning the 60 days of the State Board of Education at all.

The Court: You realize I am amenable and resilient to any extent.

Mr. Warrington: Yes.

The Court: But I had to fix a date.

Mr. Warrington: I don't object to that. I have no criticism of that whatever. But what I object to is, of course, I have misinterpreted the order apparently, but the way I interpreted it was that Milton was required if the Colored pupils applied on September 5th for admission according to the order they were instructed not to admit it. Now, that would throw everything into confusion in Milton until the State Board of Education had submitted a plan for Milton.

The Court: May I say that your interpretation of the July 15, 1957 order throws me into confusion, because it was never meant.

Mr. Warrington: Then it is my misunderstanding of the order.

Mr. Hughes: Your Honor, is it possible that we have a misunderstanding based on procedure? Was the intent of your order that a writ of injunction of some sort should be issued and served upon the members of the State Board but not upon the members of the Local Board?

The Court: No. Mr. Hughes, I shall try to write it as succinctly as possible. When I fixed the decision as to on segregation or integration that meant that there would be an end of segregation. Now, that is the decision. How it is to be enforced, I don't know the answer. I am compelled under the decisions of the Supreme Court of

United States to make that declaration. Now, how you are going to carry it out I have no magic solution for. That is the individual problem of all of you. But it is inevitable and as matter of reason we have got to face it, unless the Constitution of the United States is amended. But what I have been trying to do here is a job, and as I said in this resume that I handed to all of you, I have no venom in my heart against any public official.

Mr. Warrington: I know that.

The Court: What do you think, Mr. Tunnell?

Mr. Tunnell: Your Honor, here is what I think. If I were a judge called upon to interpret your opinion and order I should do what any judge would do; I should interpret it in the light of the motion which was the background of it, and I should feel free to take the meaning which commended itself in that background. But I feel as a lawyer representing people in a sensitive suit of this kind that if there is the slightest ambiguity or possibility of misunderstanding, and contempt of court may be the consequences of a misunderstanding, that puts a lawyer in a very different light. If there is the slightest possibility of misunderstanding I take it to be his professional duty to call it to the judge's attention and remove any possibility of misunderstanding. That was the purpose of the motion insofar as Mr. Hughes and I were concerned.

The Court: Do you think my suggested statement removes that ambiguity?

Mr. Tunnell: Yes, I do, and I have this further comment to make:

I noticed and appreciated your Honor's making the statement and reading it into the record of the case. May I inquire now whether your Honor would object if we all for our individual protection, and such proper use as we might care to make of it, could purchase from Mr. Blair a

transcript of this discussion which has followed that whether you would rather we would not?

The Court: I think, Justice Tunnell, that whatever your desires are in that respect they will be granted.

Mr. Tunnell: I for one, when we conclude the discussion, would like to ask Mr. Blum in due course to send a copy.

The Court: What I propose to do, Justice Tunnell, is to let you keep the copies I have given you. If you want official transcript——

Mr. Tunnell: Oh, I didn't mean of the statement because the copy you gave me is sufficient. I alluded to the discussion which has followed the handing out of the statement which in some respects has highlighted and emphasized the things which your Honor has said. In your Honor's remarks I think it is cleared up.

The Court: You are entirely at liberty to have recorded and memoralized anything that has been said here.

Mr. Tunnell: I am satisfied.

Mr. Craven: In view of this discussion—we had come here to ask your Honor at the end of this discussion for permission to file a motion to stay judgment preparatory to our taking an appeal on the instruction of the State Board of Education. I don't know whether this statement which you have read into the record and the discussion here now make any difference in the attitude of the State Board of Education. I am inclined to think that perhaps the reason for instructing me to take an appeal was because of this confusion in the minds of many Local Boards as to the impact of your Honor's order, particularly Paragraph 3 that restrains specifically—it uses the word "restrain." I don't have it before me.

The Court: I still come back to what I said some fifteen minutes ago, that Paragraph 3 is a declaration of

cisional law. It has no injunctive process involved in its language.

Mr. Craven: And specifically your Honor would not feel that those Local Boards were in contempt.

The Court: You don't feel, you think.

Mr. Craven: You don't interpret your own language to mean that those Local Boards would be in contempt.

The Court: No. Paragraph 3 is not injunctive language. It is a declaration of decisional law. I will read it again:

"3. The minor plaintiffs in the respective cases and all other Negro children similarly situated are entitled to admittance, enrollment and education, on a racially non-discriminatory basis, in the public schools of Clayton School District No. 119, Milford Special School District, Greenwood School District No. 91, Milton School District No. 8, Laurel Special School District, Seaford Special School District, and John M. Clayton School District No. 97, respectively, no later than the beginning of or sometime early in the Fall Term of 1955."

Now, in my mind when I wrote that that was a declaration of the legal status. How do you carry it into effect? I don't know the answers.

Mr. Craven: Your Honor, I see it is No. 4.

The Court: All right, we will go to No. 4. Now, No. 4 is directed at your client, the State Board. As I have said in my statement, the onus is on the State Board to get busy and submit a plan. "In accordance therewith defendants" —that is meant to include only the State Board of Education, the State Board and its Superintendent. You are arguing the causes of the Local Boards, Mr. Craven.

Mr. Craven: I think they are mixed up, Your Honor, I am afraid.

The Court: I am sorry, but that is the province of the judge to get mixed up, but it is also his province to explain, and I have tried to cure it sincerely.

Mr. Warrington: That makes it very clear to the Judge, that the word "defendants" refers to the State Board of Education and the Superintendent in the fourth paragraph.

Mr. Craven: And only to the State Board of Education?

The Court: I will not retreat one inch, Mr. Craven. "In accordance therewith the defendants are permanently enjoined and restrained from refusing admission," etc., and the precise matter for decision before me is on the motion for summary judgment. The decision meant those defendants that are encompassed within the motion for summary judgment. Could there be anything more clear?

Mr. Warrington: I think, your Honor, we thought the "defendants" meant the ones referred to in Paragraph 4.

The Court: No. As I said, Mr. Warrington, that was a declaration of decisional law.

So whatever your pleasure is, gentlemen, do you want to have argument on these motions or will this statement be sufficient?

Mr. Redding: That satisfies me, sir.

The Court: Pay attention to this. What I say is "Compliance with the law of the Supreme Court of the United States is inevitable. The unresolved question, left by the Supreme Court to this Court, is the duration of judicial patience." I mean that. But I don't mean to be a tyrant about it, because I have no right to be that way. What I want to do is attempt to see if we can work this thing out.

Mr. Craven: Your Honor, since we are trying to clear things here and perhaps avoid a lot of work all around

The Court: You pursue your appeal and let the Court of Appeals——

Mr. Craven: I am just wondering, since we are settling so many things here, maybe it won't be necessary. One of the things which concerned my client, the State Board of Education, was the 60-day order, and from what your Honor has stated here if we were to come into Court and ask for an extension of time——

The Court: Not frivolously.

Mr. Craven: No.

The Court: You would have to show me, Mr. Attorney General, that you have made an honest endeavor and you cannot have compliance at this point. Now, what do we do after that? We try again. But, as I say, it is inevitable, and we have got to do the best we can. If I had a magic answer to this problem I would give it to all of you, but I don't, and neither does anyone in this room have it.

Mr. Warrington: Judge, so far as I am concerned, I am satisfied with your Honor's explanation. I don't care to argue the motion. I could not expect to accomplish any more than what your Honor has stated.

The Court: What about you, Mr. Whitney?

Mr. Whitney: That is the way I feel.

The Court: Mr. Tunnell?

Mr. Tunnell: Yes, sir, I have no interest in the motion. The ambiguity that I had in mind has been cleared up. I have had no chance to confer with Mr. Hughes.

The Court: What do you think, Mr. Hughes?

Mr. Hughes: Well, I certainly think that the matter has been clarified for me in my mind, and if it is upon the record in your written statement and afterwards I don't

see how we could gain anything by pursuing the motion amend.

Mr. Redding: Assuming there is no ground shown any extension of the 60-day period——

The Court: I have no motion for extension before

Mr. Redding: Very well, sir. I am trying to antici the possibility. Assuming there is no ground shown extension of the 60-day period and the plan is not filed, I assume the initiative is on the plaintiffs.

The Court: Mr. Redding, if there is no sound, reas able ground urged before me, the 60-day period will sta Does that answer your question?

Mr. Redding: Yes.

(At this point the conference was concluded.)

VOLUNTARY WITHDRAWAL OF MOTION.

Now Comes James M. Tunnell, Jr., attorney for the above-captioned defendant individual school boards, and voluntarily withdraws the motion of these defendants to amend the court's order of July 15, 1957.

JAMES M. TUNNELL, JR.,
James M. Tunnell, Jr.,
Georgetown, Delaware,
Attorney or of counsel for the School Boards of Laurel, Greenwood, Milford and Seaford.

Withdrawal authorized this day of August, 1957.

.....
Judge.

OPINION OF THE COURT.

(Filed May 28, 1958.)

By Biggs, *Chief Judge*:

The appeals at bar arise out of seven cases in the court below relating to the same subject matter and may be disposed of appropriately in one opinion. The jurisdiction of the court below was invoked under Section 1331, federal question and jurisdictional amount, under Section 134 Civil Rights, Title 28, U. S. C. and under Section 1983, Ti 42, U. S. C., and under the Fourteenth Amendment to t Constitution of the United States. No issue as to jurisdiction is presented.

The histories of these litigations are set out in su detail in the opinions of the court below, referred to fr time to time hereinafter, and need not be repeated he It is sufficient to state that following the decisions of th Supreme Court of the United States in Brown v. Boa of Education and Topeka, 347 U. S. 483 (1954) and 349 U. S 294 (1955), the Delaware State Board of Education re quested the local school district boards to submit plans f the admission and education of Negro children into the pu lic schools of the respective school districts on a racial non-discriminatory basis. There was prompt compliance many school districts in Delaware but the local school di trict boards in Kent and Sussex Counties in general did n comply with the directions of the State Board of Educati Thereafter the minor plaintiffs, children residing with seven school districts, by guardians *ad litem*, brought th seven suits in the court below to compel compliance with th rulings of the Supreme Court of the United States in t Brown case.

1. See also the opinion of the Supreme Court of Delawar Steiner v. Simmons, — Del. —, 111 A. 2d 574 (1954).

All of the complaints allege that the minor plaintiffs are children resident within their respective school board districts and are entitled immediately to admission to the schools of their districts and would be accepted as students therein except for their race, color and ancestry. The seven suits are class actions brought on behalf of all children similarly situated to the minor plaintiffs, pursuant to Rule 23(a)(3) Fed. R. Civ. Proc., 28 U. S. C.[2]

The defendants are members of the State Board of Education, the State Superintendent of Public Instruction and members of local school boards. The relief sought by the complaints was that the court below grant interlocutory and permanent injunctions declaring that the administrative orders, regulations and rules, practices or usages, pursuant to which the minor plaintiffs are segregated with respect to their schooling because of race, color or ancestry, violate the Fourteenth Amendment to the Constitution of the United States, and that the court below issue interlocutory and permanent injunctions requiring the defendants to admit the minor plaintiffs and all other children similarly situated to the public schools of their respective school districts on a racially non-discriminatory basis.

The appellants, who are members of the State Board of Education and the State Superintendent of Public Instruction, filed joint answers in all seven cases asserting that the power to effect desegregation lies not in them but in the local school boards. The members of the boards

2. "Rule 23 . . . (a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the Court, such of them, one or more as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

"(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

In respect to the right of the plaintiffs to maintain a class action, see 145 F. Supp. 873 (D. C. Del. 1956).

of education of the school districts also filed joint answers. These answers are substantially the same and, briefly put, assert that the local boards do not possess the power or jurisdiction under the school laws of Delaware, or the available facilities, to effect the admission of the minor plaintiffs or other children similarly situated to the respective schools on a racially non-discriminatory basis.

The members of the Board of Trustees of Clayton School District No. 119, at C. A. No. 1816 in the court below, No. 12,375 in this court, answered also that they were "improper parties" to the action. The court below correctly held this contention invalid. 149 F. Supp. 376 (D. C. Del. 1957).

On January 21, 1957 the plaintiffs in the case involving the Clayton School District mentioned immediately above filed a motion for summary judgment pursuant to Rule 56(a), Fed. R. Civ. Proc., 28 U. S. C.[3] After argument, the court below on March 6, 1957, filed an opinion, 149 F. Supp. 376, holding that the members of the Board of Trustees of Clayton School District No. 119 were making no reasonable start toward the admissions of the minor plaintiffs and those similarly situated on a racially non-discriminatory basis. Following this opinion, on April 1, 1957, the court entered a decree enjoining members of the Board of Trustees of the Clayton School District "in accordance with further order" from refusing admission to children on account of race, color or ancestry and requiring the members of the Board of Trustees of the Clayton School District to submit to the State Board of Education, within 30 days, a plan for the admittance to, and the enrollment and education in the

3. Rule 56(a) is as follows: "For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof."

public school maintained by the Board of the minor plaintiffs and all other children on a racially non-discriminatory basis, and also requiring the members of the State Board of Education with 60 days to file a plan so providing with the court below.

An appeal from this decree was taken to this court but was not prosecuted and accordingly the record was returned to the court below. The decree of April 1, 1957 is presently outstanding. No other similar decree addressed to members of the local school boards was entered in the other six cases but it is in this respect only that the case involving Clayton School District No. 119 differs in substance from the other six cases involving the other local school boards. However, in view of the fact that the operation of the decree in the Clayton case was made contingent on a further order of the court below we are justified in treating and will treat this case as in pari passu with the other six cases.

On June 21, 1957, the plaintiffs in six of the seven cases, the case at No. 1816 in the court below involving Clayton School District No. 119 being excluded, moved for summary judgment against the members of the State Board of Education and the State Superintendent of Public Instruction. It should be noted that the defendants who are members of the local school boards were not included in these motions. On June 25, 1957, the plaintiffs in the six cases last referred to, the case at No. 1816 in the court below being excluded, moved to consolidate the six cases.

On July 25, 1957, the court below handed down an opinion, 152 F. Supp. 886, granting the motion to consolidate the six cases and the motions for summary judgment against the members of the State Board of Education and the State Superintendent of Public Instruction. The court below went further, however, and, apparently *sua sponte*, since no applicable like motions had been filed for summary judgment and for consolidation in respect to the suit at No. 1816 in the court below involving the Clayton School District No. 119, also granted summary judgment in that case

against the members of the State Board of Education and the State Superintendent of Public Instruction and consolidated that case with the other six actions. The decree of the court below was an appropriate and proper one, and furnishes us with an additional reason for treating the appeal involving the Clayton School District No. 119 on a parity with the other six cases. The decree entered in all seven cases by the court below requires that the minor plaintiffs in all seven cases and children similiarly situated should be admitted to their respective school districts on a racially non-discriminatory basis by the Autumn term 1957 and enjoins the designated defendants from refusing admission to these children. It also directs the State Board of Education and the Superintendent of Public Instruction to submit a plan to the court for the admittance, enrollment and education of the children on a racially non-discriminatory basis within 60 days and to serve copies of the plan upon the members of the local school boards involved within 45 days.[4] The appeals at bar, taken by the members of the

4. The order of the court is as follows:

"1. The motion of plaintiffs to consolidate the following causes, C. A. 1816 through C. A. 1822, inclusive, be and the same is hereby granted and all pending causes in this Court are hereby consolidated for judicial decision.

"2. The plaintiffs' motions for summary judgment in C. A. 1816 through C. A. 1822, inclusive, as against the Members of the State Board of Education and the State Superintendent of Public Instruction be and the same are hereby granted.

"3. The minor plaintiffs in the respective cases and all other Negro children similarly situated are entitled to admittance, enrollment and education, on a racially nondiscriminatory basis, in the public schools of Clayton School District No. 119, Milford Special School District, Greenwood School District No. 97, Milton School District No. 8, Laurel Special School District, Seaford Special School District and John M. Clayton School District No. 97, respectively, no later than the beginning of or sometime early in the Fall Term of 1957.

"4. In accordance therewith defendants are permanently enjoined and restrained from refusing admission, on account of race, color or ancestry, of respective minor Negro plaintiffs and

State Board of Education and the Superintendent of Public Instruction, followed.

The State Superintendent of Public Instruction and the members of the State Board of Education assert that the exercise of two powers are essential for planning and effecting desegregation. They argue that to admit the children involved to the respective public schools involved, authority must be exercised to admit individual students to one school rather than to another and that to educate students it is necessary to possess the authority to employ and assign teachers and principals to the various schools. They assert also that the powers necessary to effect these results are vested by the pertinent Delaware statutes solely in the local district school boards. They point to the provisions of 14 Del. C., Sections 741, 944, 976, 1401 and 1410, which variously provide for the employment of teachers and prin-

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all other children similarly situated to the public schools maintained in the respective above-mentioned school district.

"5. To further obtain and effectuate admittance, enrollment and education of said minor plaintiffs and all other children similarly situated to the public schools maintained in the respective above-mentioned school districts, on a racially nondiscriminatory basis, defendant Members of the State Board of Education, having general control and supervison of the public schools of the State of Delaware and having the duty to maintain a uniform, equal and effective system of public schools throughout the State of Delaware, and defendant George R. Miller, Jr., State Superintendent of Public Instruction, shall submit to this Court within 60 days from the date of this order a plan of desegregation providing for the admittance, enrollment and education on a racially nondiscriminatory basis, for the Fall Term of 1957, of pupils in all public school districts of the State of Delaware which heretofore have not submitted pupils under a plan of desegregation approved by the State Board of Education.

"6. 15 days prior to the submission of said plan to this Court, defendant Members of the State Board of Education, etc., shall send in writing by registered mail a copy of the plan of desegregation herein ordered to be submitted to this Court, together with a copy of this Order, to each member of the school board in all public school districts of the State of Delaware which heretofore have not admitted pupils under a plan of desegregation.

cipals of schools, for the fixing of their salaries and for the termination of their employment.

The appellants point also to 14 Del. C., Sections 940 and 941, providing for the establishment of Boards of Education in the local school districts[5] and specifying the duties of these boards, included among which is the determining of policies in relation to the maintaining of separate schools for white and colored children, and the settling of disputes and for properly administering the public schools of the districts. The appellants also assert that they are without the authority to impose a plan for desegregation on the boards of education of the respective school districts because the members of these boards in Kent and Sussex Counties are elected by the voters of the school districts, 14 Del. C., Section 305, and that therefore they are without authority to appoint or remove these elected representatives or to control their actions in any way. In short, the appellants contend that they are without power effectively to carry out the court's decree.

Some of the local or district school boards, employing those of Milford, Seaford, Laurel and Greenwood as examples, contend primarily that the State Board of Education possesses the power to determine the operation of the public schools and that the State Board has the authority to adopt rules and regulations for the administration of the public school system of Delaware and that these shall be binding throughout the State. 14 Del. C., Section 122. They assert also that the school laws of Delaware put the burden on the Board of Education and the State Superintendent of Public Instruction to maintain a "uniform, equal and effective" educational system in Delaware. 14 Del. C., Section 141. The plaintiffs make similar contentions but they also assert that the Supreme Court of Delaware in Steiner v. Simmons, — Del. —, 111 A. 2d 547 (1955), held

5. It should be noted that Section 301, 14 Del. C., defines a "district" as meaning a "School District or a Special School District or both."

that the State Board of Education has the power to regulate the public schools of Delaware, relying *inter alia* on 14 Del. C., Sections 101(a), 121 and 122. These statutory provisions place certain supervisory powers over the whole of the Delaware School system in the State Board of Education. While the parties to these suits make other and further contentions these need not be discussed in this opinion. It should be noted, however, that we have considered them.

In determining the issues presented it is necessary to start with the guiding principles enunciated by the Supreme Court in its opinions in United States v. Board of Education of Topeka, *supra*. First, the Supreme Court has ruled that the Fourteenth Amendment to the Constitution of the United States prohibits the segregation of children in public schools solely on the basis of race. Second, the Court has prohibited admission to the public schools on a basis of racial discrimination. Third, the Court has required United States District Courts to enter such decrees as are necessary and proper to admit children to public schools on a racially non-discriminatory basis "with all deliberate speed."

Among the statutory duties entrusted to the State Board of Education by the General Assembly of Delaware is that of maintaining a "uniform, equal and effective system of public schools throughout the State . . .", 14 Del. C., Section 141. While this section of the Delaware Code also requires the State Board of Education, pursuant to Article 10, Section 2 of the Constitution of Delaware, to maintain separate systems for white and Negro children, these provisions fall in view of the decisions of the Supreme Court of the United States referred to for these decisions redefined the contempt of equality in public education. But while the separate but equal provisions of the Delaware Constitution and laws have been stricken down, the statutory mandate to the State Board of Education continues to exist and requires that body to maintain a uniform, equal

and effective public school system in the State of Delaware. To hold otherwise would be nullification.

The contention of the members of the State Board of Education that the mandates of that body have no force upon the local school boards and the persons who comprise them is erroneous. The time when the Delaware educational system was encompassed by a loose federation of "425 educational republics" has long since passed. 2 Bush, History of Delaware, 691. The centralized nature of the present Delaware public educational system and the powers and duties of the State Board of Education are demonstrated fully by statutes of Delaware dealing with education.[6] This contention of the members of the State Board of Education is really one to the effect that the individuals comprising the local school boards will not obey the law. We will not make such an assumption.

We point out again that 14 Del. C., Section 122, gives the State Board of Education the power to "adopt rules and regulations for the administration of the free public school system which, when prescribed and published, shall be binding throughout the State." As if to re-emphasize the

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6. As follows: 14 Del. C., § 101(a). The State is vested with the "general administration and supervision of the free public schools and of the educational interests of the State."

14 Del. C. § 121. "The Board shall exercise general control and supervision over the public schools of the State. . . ."

14 Del. C. § 121(2). The State Board has the power to determine the educational policies of the State.

14 Del. C. § 121(7). The State Board shall decide "all controversies and disputes involving the administration of the public school system."

14 Del. C. § 121(10). The State Board shall have the duty of "causing . . . the provisions of this title to be carried into effect so as to provide a uniform, equal and effective system of public schools throughout the State; . . . ."

14 Del. C. § 141(a). "The Board shall maintain a uniform, equal and effective system of public schools throughout the State, and shall cause the provisions of this title, the by-laws and regulations and the policies of the Board to be carried into effect."

paramountcy of the State Board of Education's function in developing and maintaining a uniform school system throughout the State, Section 941, 14 Del. C., in specifying the duties and powers of the local school boards of the respective school districts, states the members of these bodies shall perform their duties and exercise their powers "subject to the provisions of . . . [Title 14] and in accordance with the rules and regulations of the State Board of Education." In view of the foregoing we cannot doubt but that the State Board of Education was designed as and is the central administrative force in Delaware's system of public education and is not a mere powerless reviewer of actions taken by local school boards. Our ruling as to the effect of the school laws of Delaware in this respect is confirmed by the opinion of the Supreme Court of Delaware by Mr. Chief Justice Southerland in Steiner v. Simmons, *supra*, — Del. at p. —, 111 A. 2d at p. 580, wherein it is stated: "By the school laws of the State, it [the State Board of Education] is vested with general policy-making power, and with authority to adopt rules and regulations for the administration of the public school system."

Accordingly we perceive no merit in the contention of the State Board of Public Education and of the State Superintendent of Public Instruction that the failure of the court below to subject the members of the local school boards to the injunction of July 15, 1957 places or leaves the members of the State Board of Education and the State Superintendent of Public Instruction in such a position that they stand in danger of contempt proceedings in the court below. The appellants say that they are in a position of danger because the mandate imposed upon them by the order of the court cannot be carried out by them in view of the uncooperative attitude of members of the local school boards. The appellants assert legal impotency to carry out the decree of the court unless the members of the local school boards be made subject to the injunction. If a

specific order of the court below be required to compel the members of the local school boards to perform their duties under the school laws of Delaware, we may assume that the court below will enter an appropriate decree against them at an appropriate future time and also will have due regard for the actions taken by members of the State Board of Education and by the State Superintendent of Public Instruction to create a racially non-discriminatory school system in Delaware. We reiterate that we will not assume that the members of the local school boards, also named as defendants in the instant litigations, will not adhere to rules and regulations of the State Board of Education as to the non-discriminatory racial practices if such rules and regulations are created and promulgated by the State Board of Education.

Moreover, an analysis of the decree appealed from demonstrates that the members of the State Board of Education and the State Superintendent of Public Instruction are not required to guarantee the accomplishment of desegregation in the Delaware school system but are enjoined from refusing admission to the minor plaintiffs and other children similarly situated to the schools of their respective school districts on account of race, color or ancestry. In short, the decree of the court below was designed to relieve the appellants of passivity and to compel them to go forward with the desegregation of the Delaware schools. The first step to be taken by the State Board of Education, with the aid of the State Superintendent of Public Instruction, is to submit a plan designed to effect the principles enunciated in the decisions of the Supreme Court in Brown v. Board of Education of Topeka, *supra*, as ordered by the court below.

The members of the State Board of Education and the State Superintendent of Public Instruction may not delay further in the formulation and submission of such a plan. They must prepare and submit it promptly. The time

for hesitation is past and the time for definitive action has arrived. The law as enunciated by the Supreme Court of the United States must be obeyed by all of us. If we do otherwise we will destroy our present form of constitutional government.

The decree of the court below stated dates in 1957 by which such a plan should have been submitted by the State Board of Education. Those dates are, of course, presently inoperative. New dates must be set. This is a matter which must be left to the discretion of the trial court. Those portions of the decree stating dates for the submission of the plan by the State Board of Education to the court below and to each member of all of the school boards in all of the public school districts which heretofore have not admitted pupils under a racially non-discriminatory plan, will be vacated so that the court below will be free to take appropriate action. The decree in all other respects will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

OPINION OF THE DISTRICT COURT IN EVANS ET AL. v. BUCHANAN, ET AL.

(As Amended)

LAYTON, *District Judge.*

The chronological legal background of these cases is fully set out in *Evans v. Buchanan, et al.*, 152 F. Supp. 886 (D. C. Del., July 15, 1957) and *Evans v. Buchanan, et al.*, 256 F. 2d 688 (C. A. 3rd, July 23, 1958).

It is sufficient here to say that on May 17, 1954, the Supreme Court of the United States declared that racial discrimination in the public school systems was unconstitutional, *Brown v. Board of Education of Topeka*, 347 U. S. 483, and on May 31, 1955, by a supplemental opinion, 349 U. S. 294, announced that the primary responsibility for solving the many local problems which would inevitably arise from integration must rest upon the local school boards so long as they acted in good faith.

In the cases before me, a group of Negro children, through their guardians, brought class actions for injunctions in this Court to require their admission to the public schools of Delaware on a racially nondiscriminatory basis. The State School Board defended upon the ground that many local boards had refused to follow its directives as to integration and that it was powerless to enforce them upon what it conceived to be autonomous bodies. Judge Leahy granted summary judgment against the defendants holding that the defendant, State Board, had complete authority over the actions of the local boards and directing the former to file a plan of desegregation on a state-wide basis within a stated time. The Third Circuit Court of Appeals affirmed. The time for the filing of the plan having expired pending the appeal, a supplemental order was entered on November 19, 1958, which, together with minor amendments thereto, directed that the State Board of Education submit

a plan of desegregation with this Court within 112 days, and setting a hearing thereon on Tuesday, March 17, 1959.[1]

A plan has now been prepared and submitted in accordance with the requirements of the order. In simple terms, it provides for desegregation of the Delaware Public School System on a grade by grade basis over a period of twelve years beginning with all first grades at the Fall term, 1959. A three day hearing was held upon the plan followed by the filing of briefs and oral argument.

In its first opinion in *Brown v. Topeka*, briefly mentioned above, the Supreme Court stated that:

> "* * * the plaintiffs * * * are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."

And in its second opinion it was held that:

> "* * * School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles * * *."

> "* * * Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditonal attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take

1. The order provided for the submission of a tentative plan to the local boards to be followed by further discussion and, thereafter, the preparation and submission of a final plan.

into account the public interest in the elimination of such obstacles in a systematic and effective manner • • •.

"• • • Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems • • •."

The plan of the State Board is the only one before me for consideration. Neither the plaintiffs nor any other interested party have offered an alternative. The plaintiffs apparently take the position that they are under no duty to offer a plan—rather, that it is the burden of the State Board to prepare a plan which, in all respects, must meet the requirements of the Brown cases. With this I agree. But to the extent that the plaintiffs at times seem to contend that no plan other than one calling for total desegregation is contemplated by the Brown decisions, I disagree. The language of the two opinions plainly permits a more gradual transition if the circumstances require.

Conditions which, if fairly found to exist, would call for something less than full and immediate desegregation are (1) the problem of additional buildings or classrooms and teaching personnel in a given locality due to an increase in enrollment; (2) the difficulties attending the reshuffling of the extensive school transportation system because of the relocation of students in different schools; (3) the clos-

ing of some schools entirely and the merging of others into more convenient districts together with the drafting, presentation and passage of legislation without which certain of these objectives cannot be satisfactorily solved; (4) the financial burden occasioned by new buildings and additional personnel which will fall in part upon local taxpayers and in part upon the State; (5) the problems of meshing substantial numbers of Negroes into a hitherto all white school system where the educational achievement level of the former is significantly lower than that of the latter and (6) the impact of integration upon a predominantly Southern society.[2] The plaintiffs have objected to this latter consideration as irrelevant. I do not agree. My reasons will appear fully hereafter

Before considering the plan itself, it is appropriate to state that, in my judgment, any thought of a total and im-

2. The two lower Counties, Kent and Sussex, are bounded by Maryland on the South and West, New Castle County on the North and the Delaware River, Bay and Atlantic Ocean to the East. This area lies opposite Washington and Northern Virginia. Historically, it held to the Union during the Civil War but, nevertheless, approximately 1550 slaves then existed in the Southern Counties. It is almost exclusively an agricultural area and with the exception of Dover, Milford and Seaford, the population of no town exceeds three thousand. It is populated with numerous farms, small and large, and with villages and small towns, the latter of which derive most of their income from agriculture and its derivatives. In its manners, customs and thinking, this area is noticeably Southern in character. Segregation exists in nearly all aspects of its social life. While white and colored not infrequently work side by side, a rigid segregation exists in the schools, churches and to only a slightly lesser extent in restaurants. In the motion picture theaters, the colored sit in one side or another of the balconies. There are separate parent-teacher associations connected with the schools, and segregation exists in such organizations as Kiwanis, American Legion and the like. Separate bathing is generally recognized at bathing beaches. As said in American Mercury, July-Dec. 1950, "There are two Delawares separated from each other by an imaginary extension of Mason & Dixon's line. In Delaware, the line is without political significance but this is the one place where it perceptibly separates North from South. Northern Delaware is urban, industrial and hilly. Southern Delaware is rural, agricultural and flat as a bowling alley. The farmers of Southern Delaware are as Dixie-oriented as their neighbors on the Eastern Sho' of Maryland; * * *."

mediate integration of the Delaware School System is out of the question. I agree fully with the testimony of the witnesses in this respect.

The question may then well be asked why consideration should not be given to the immediate desegregation of some large segment of the System, such as the elementary or secondary grades.[3] In this connection, it can be fairly said that the present high school situation in the lower Counties is particularly open to criticism insofar as concerns segregation because in Sussex County, for instance, there is but one colored high school located in Georgetown in the central part of the County with the result that large numbers of colored students daily are transported by bus long distances (up to 25 miles) to school only to have to face the same long return trip at the day's end. And, in so doing, many of them may pass a white high school close to their own homes. Even so, there are convincing reasons why total desegregation of the high schools should not be attempted now. From testimony of Dr. Miller, supplemented by an exhibit introduced by the State Board, it is possible to present a fair picture of some of the problems which arise as the result of such a plan.

HIGH SCHOOLS INCLUDING JUNIOR HIGH

	Present Whites	*Additional Negroes*	*Per Cent Increase*	*Room Possible Now*
Caesar Rodney	877	85	10% (very crowded now)	No
Smyrna	544	134	25%	No
Milford	853	163	19% (very crowded now)	No
Harrington	333	37	9%	Yes
Dover	995	252	25% (crowded now)	No
Seaford	812	194	25% (crowded)	No
Rehoboth	227	33	7%	Yes
Lewes	393	103	26%	No
Laurel	629	151	24%	No
Georgetown	483	126	25%	Possible
Millsboro	306	128	42%	No
Selbyville	250	80	32%	No

3. Generally speaking, the Delaware Schools are divided into the elementary grades, 1-6, and the secondary grades, 7-12, of which grades 7 and 8 are classified as Junior High School.

Overcrowding is clearly indicated, but that is only one of the problems. Overcrowding creates the need for additional rooms, additional teaching personnel and additional facilities of many other sorts. While only a few estimates are given,[4] the increased cost for the construction and operations budgets would obviously be very substantial. The cost of the former would fall on an unwilling citizenry and of the latter on a state rapidly approaching a bad financial crisis.

Moreover, aptitude tests are in evidence indicating that the academic achievement levels of the Negro are significantly lower[5] than those of white students of corresponding age. To force integration at the high school level would pose yet another serious problem, i.e., at the expense of the white students to downgrade existing academic standards to a level capable of being met by the average Negro or to maintain existing standards which, through no fault of their own, many of the Negroes could not presently meet.

Finally, but not of least importance, is the emotional strain upon the whole educational system as the result of an immediate desegregation of any substantial segment of the school system, such as the high schools, in a predominantly Southern society. This may come about through forces operating both from within and without the school system. By the high school age, prejudice has unfortunately had ample time to take root. These prejudices will inevitably make themselves felt in the classroom. As an example of how similar tensions may be stirred up from without, we have the testimony of Dr. Madden, the Superintendent of the Seaford Schools, who stated:

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4. New construction at Caesar Rodney would cost $240,000 and Millsboro in excess of $150,000.

5. It is worth noting that while Dr. Clark, plaintiffs' expert psychiatrist, was able to demonstrate that the defendants' exhibit tending to show that the Negro children had a substantially lower I. Q. than the white was of little significance, yet he failed to mention the achievement tests.

"That is right, sir. We had one meeting [held by Bryant Bowles] near our district, and the following day there seemed to be a vicious rumor circulated that the Seaford Board of Education had accepted colored students into the school. We had parents coming to the school that day and taking their children out of school. We had children roaming the halls, leaving classrooms at will with utter disregard for teacher control or discipline, without regard to anything I had to say, the principal of the school, and then even to the point of having a representative group of people come into the school and roam the school at will until I called them into my office to ask what the disturbance was, and confronted with this statement that they understood there were colored students admitted to the school. I asked them to produce any evidence. They, of course, could do nothing but say that this was hearsay evidence, and the group then decided to leave, after convincing themselves apparently that there were no colored students admitted. But for the next several days after this the general excitement and the turmoil was such that administrative control was very difficult."

The same considerations above discussed preclude any thought of an immediate integration of the first six elementary grades. Again, from Defendants' Exhibit 14, it is possible to demonstrate the result in a few, selected situations:

	Additional Numbers	*Approximate Per Cent Increase*	*Approximate Cost of New Building*
Houston	48 (grades 1-8)	30%	$60,000
Kenton	40	52%	$60,000
Bridgeville	261	over 70%	Probably nearly $250,000
Ellendale	70	62%	$60,000
Millsboro	264	over 65%	Probably over $250,000
Selbyville	155	60%	Over $200,000

As can be seen from this study, many more students, teachers and facilities would be involved than at the high

school level. The difference between the academic achievement potentials of the two races, while less pronounced, would begin to appear at the fifth and sixth grade age and the resentment of the community would be equally strong.

Even the thought of desegregating immediately some portion of the elementary grades presents definite problems, although obviously of a much lesser degree. The variation in the achievement potentials between the two races is not too significant at the third grade level, for instance, nor does racial prejudice usually exist at that early stage. Nevertheless, Dr. Simpson, Superintendent of the Caesar Rodney School testified that "* * * to add students from the Star Hill (colored) School would certainly overcrowd the facilities that are already overcrowded." And judging from Defendants' Exhibit 4, if the first three grades were now desegregated, the enrollment of Kenton School [6] would be increased 26%, Millsboro about 33% and Bridgeville as much as 35%. Again, examples may be multiplied.

Even so, I suppose it would be possible to integrate the first three grades immediately. Statistics may be variously interpreted. The point is debatable. The State Board does not feel so. It has an advisory staff composed of experts in the field. They know the problems involved both from the point of view of education, administration and finance. Many of these gentlemen, Dr. Madden, Superintendent of the Seaford Schools, for example, come from areas wholly free from racial prejudice. To a man they agree that any plan calling for integration on any wider scale than the one here proposed would be a mistake. Under such facts, for me to substitute my judgment for theirs would not only offend familiar legal principles but would, in effect, infer lack of good faith on the part of the State Board of Education.

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6. Approximate figures arrived at by dividing in half certain of the estimated increased enrollments taken from Defendants' Exhibit D.

Bad faith has been charged. To the contrary, the State Board acted with considerable courage in attempting to take over the operation of the Milford Schools under a plan of integration put into effect immediately after the announcement of the first decision in Brown v. Topeka. The deep and lasting animosities, threats of violence and damage to school morale occasioned by that unfortunate incident, to the embarrassment of us all, have become a matter of record in the public press throughout the entire country. Ultimate responsibility is a heavy burden as only those who have had it can appreciate. Knowing what has happened not only in Delaware but elsewhere, and understanding the temper of the Southern Counties, the Board in the best of faith, I am certain, devised a plan, which in its judgment would both get desegregation under way at once and, at the same time, create the least possible opposition. Under such circumstances, any imputation of bad faith must be rejected.

What has just been said not only raises an important aspect of the integration question which should be met head-on but also illustrates my reason for overruling the plaintiffs' objections to the admission of evidence as to the effect of desegregation upon a predominantly Southern society.

The plaintiffs protested strenuously against the admission of such evidence upon the ground that it is wholly irrelevant to the issue here and cited the following language from *Cooper v. Aaron*, 78 S. Ct. 1401, the so-called "Little Rock case", in justification of their position:

> "The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature. * * * Thus law and order are not here to be preserved by depriving the Negro children of their constitutional rights."

Read in its proper context, no one would presume to disagree. Here, however, we are faced, not with the question of whether there shall be integration at all, but with deciding the most sensible way of carrying out what is already an accomplished fact. Theoretically, a Court should be very slow to uphold or to reject a plan of desegregation based upon fear, and fear alone, of its effect upon a hostile community. Thus, the threat of desegregation on a wide scale in a section where racial prejudices exist may cause neighbors to cease speaking, threats of violence, mass meetings of protest and misguided individuals disguised in sheets to burn crosses on people's lawns. Standing alone, this might be said to be a regrettable community problem quite irrelevant to a consideration of whether or not a given plan of integration is reasonable. The difficulty is, that as a practical matter, some demonstrations can never stand alone. Inevitably, they overflow into the classroom and then we have a Little Rock, a massive resistance movement or another Milford incident. As a result, the schools are filled with emotional stresses and strains, some classes are suspended indefinitely, while others limp along in an atmosphere of tension and hostility seriously interfering with the process of learning. Violence and open disrespect for law and order flourish on the school grounds and who is the loser? The students, both Negro and white, or in other words, the cause of education, which is so vital to the free world today that the Supreme Court of the United States in *Brown v. Topeka*, 347 U. S. 483 (493) said this:

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a

principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

Surely, the public interest would be better served by a gradual plan which would go a long way toward eliminating the possibility of another setback to the cause of education in Delaware such as the Milford * incident. And a frank recognition of this fact should certainly be a relevant factor in determining whether or not a given plan is reasonable and practicable.

The community feeling is relevant in another fashion also. It has been testified to that before total integration is completed, it will become necessary to re-divide the State schools into a more orderly system of districts. Who will do this? The legislature, a majority of whom are from the Southern Counties and who, being human, will vote for a piece of legislation only if it pleases them. New classrooms and buildings will be needed in the near future costing many hundreds of thousands of dollars. Where will this money come from? As pointed out earlier, it must be raised by means of a local referendum wherein the citizens bind themselves to higher taxes. This Court has wide powers but among them is not the power to compel taxpayers from a predominantly Southern society to vote substantial addi-

* Following the first opinion in Brown v. Topeka, the Milford School Board attempted an immediate plan of desegregation. The community instantly rebelled. Mass meetings, Ku Klux Klan demonstrations and other threats of violence occurred under the leadership of one Bryant Bowles. The schools were closed down completely for some time.

tional taxes upon themselves for a proposition so unwelcome as desegregation.

All this demonstrates very plainly that unless the public is in back of the plan, the cause of education will suffer in the long run. A more convincing reminder of this fact could scarcely be imagined than the testimony of James M. Rosbrow who appeared as a witness in this case. It deserves to be quoted, but the testimony might lose some of its weight if it were not first stated that Mr. Rosbrow is a scholarly, articulate and public-spirited citizen, vitally interested in the cause of education. A Jew, he is utterly impatient with segregation in any form and as a member of the New Castle School Board, in 1954, he led his Board in pushing through a plan of integration even before the mandate of the Supreme Court in *Brown v. Topeka* was handed down. Yet, as President of the Delaware Congress of Parents and Teachers, he has, of necessity, traveled widely throughout the lower part of the State and become familiar with local problems and local feelings. A portion of his testimony follows:

> "* * * in terms of my own knowledge and in terms of the people with whom I have talked, in terms of the meetings I have attended and the very careful, soul-searching I have done, I believe that the plan proposed by the State Board is a sound workable plan for Delaware and Kent and Sussex Counties. I believe it is the type of plan that will rally to its support the decent-thinking people of Kent and Sussex Counties. I think it is of tremendous importance that a matter of this grave impact to the community shall have community support. I say again, sir, that in all sincerity I wish it were possible, and I wish I thought it were feasible, that a twelve-grade plan should work forthwith. This I believe in. But on the other hand I don't want to see another Milford incident if anything I can do can help that. I don't want to see another Bryant Bowles given hospitality in the State of Dela-

ware. I feel that this great wrong which has continued so long can better be remedied in such manner as to have true community acceptance by being allowed to go forward on a gradual basis."

To summarize, a careful consideration of all the material factors involved in effecting an orderly desegregation of the school system convinces me that any plan calling for the immediate desegregation of all the State schools or of any large segment of the system, such as the high schools, or the first six grades, would be wholly unfeasible. Reasonable minds may differ on the question of whether a plan calling for the immediate integration of the first three grades would be justified. However, there is unrefuted testimony from experts that it would not, and on top of this there is the almost certain knowledge that any kind of severe plan would be bitterly resented with unfortunate consequences to the whole school system. Under such circumstances, for a Court to attempt to substitute its judgment for that of the State Board of Education would amount to an unwarranted abuse of judicial discretion.

The plan will be approved with the exception of two paragraphs which in my opinion should be eliminated.

Paragraph 4 of the plan says this:

"Whenever possible, every pupil in the grades affected, beginning with the start of the fall term, 1959, and in additional grades as the program expands in succeeding years shall have the choice of (a) attending the nearest school within the district in which he resides or (b) attending the school he would have attended prior to the effective date of this order."

Now, it is a fact that in Georgetown, for example, the majority of the Negroes live in a community known as The Hill. The colored school is close by. The white school is at a much greater distance. Interpreting the language of paragraph 4 in the light of these facts, it would seem to result

that no Negro student whose family resides on The Hill may ever enter the white school. Whatever may have been the reasons for this provision, it strikes me as unfair and is ordered to be stricken.

Paragraph 5 of the plan, in effect, provides that no white student intending to enter the first grade of school at this Fall term need register but that all Negro children must do so. No one seems to remember just how or why this paragraph crept into the plan. I am sure that it was not intended to be discriminatory but it savors of discrimination and should be eliminated.

Finally, there remain for disposition the arguments advanced by the Milton Special School District No. 8 and the Caesar Rodney Special District that the plan should be amended to the extent that where, in the judgment of a local school board, the integration of the first grade this year, or of any grade hereafter, would cause unnecessarily crowded conditions, then the grade need not be desegregated until the needed facilities are provided. The short answer to this is that the power to delay, resting in unfriendly hands, is tantamount to the power to defer interminably or to defeat altogether. This request must be rejected.

An order will be entered directing that an amended plan be submitted within 30 days in accordance with this opinion.

The foregoing should be deemed to constitute Findings of Fact and Conclusions of Law.

At Wilmington,
April 24, 1959.

SUPPLEMENTAL OPINION OF DISTRICT COURT.

LAYTON, *District Judge.*

On April 24, 1959, this Court approved a plan providing for the desegregation of the Delaware Public School system on a grade by grade basis over a period of twelve years beginning with all first grades at the Fall Term, 1959. Paragraph 4 of the Plan was disapproved and ordered eliminated because it was thought to be discriminatory. This paragraph read as follows:

> "Whenever possible, every pupil in the grades affected, beginning with the start of the fall term, 1959, and in additional grades as the program expands in succeeding years shall have the choice of (a) attending the nearest school within the district in which he resides or (b) attending the school he would have attended prior to the effective date of this order."

In ordering the paragraph stricken, the Court stated:

> "Now, it is a fact that in Georgetown, for example, the majority of the Negroes live in a community known as The Hill. The colored school is close by. The white school is at a much greater distance. Interpreting the language of paragraph 4 in the light of these facts, it would seem to result that no Negro student whose family resides on The Hill may ever enter the white school. Whatever may have been the reasons for this provision, it strikes me as unfair and is ordered to be stricken."

The petition now before this Court seeks the restoration of paragraph 4 to the Plan or, in the alternative, that the Plan contain a provision permitting each local board to establish attendance areas. Insofar as concerns this latter alternative, it is sufficient to say that not only from a practical, but also from a legal, standpoint it is unacceptable.

As to the restoration of the former paragraph 4 to the Plan, the petitioners say, first, that it is not discriminatory, citing *School Board of Charlottesville, Va. v. Allen*, 240 F. 2d 59 (C. A. 4th) and, secondly, that it is necessary that any over-all plan contain a provision establishing uniform attendance areas.

It is not clear just how the Allen case, above cited, establishes that a provision such as paragraph 4 is not discriminatory. All the Fourth Circuit Court of Appeals said in that decision was that "* * * local rules as to assignment to classes, so long as such rules are not based on race or color, are to be observed * * *." Had paragraph 4 stated merely that Negro students must abide by the regulations of the State School Board as to attendance areas provided such areas were not established in such fashion as to discriminate against the colored race, there could have been no possible objection. But the paragraph said no such thing. Read against a background of geographical facts of which judicial knowledge may be taken, it provided that in many localities no colored student could ever attend a white school unless his parents thereafter changed their residence to a point closer to the white school than the colored school. Moreover, the paragraph was discriminatory because a white student who lived closer to the colored school than the white school could, nevertheless, thereafter attend the white school.

Nor, contrary to the argument of the petitioners, is it essential that the Plan contain a provision providing for uniform attendance areas throughout the State. The State Board of Education has the clear power to establish attendance areas by regulation and all Negro students must abide by any such regulation provided it is non-discriminatory in character and fairly administered.

In conclusion, it may be said that many problems will arise from time to time as the result of integrating the Public School System which can only be solved by patience, wisdom and tolerance. The question of the establishment of

uniform attendance areas may constitute a major problem in the future, although, contrary to the contentions of the State Board, no such problem presently exists. The Court is not disposed to see the State educational system disrupted by a sudden, unlimited influx into the white schools of vast numbers of colored students which will lead to serious overcrowding and place a severe strain on school facilities. Nor, conversely, will it permit the school authorities to confine integration to a bare token under the guise of regulations such as paragraph 4. More than five years have now expired since the Supreme Court of the United States declared racial segregation in the public schools unconstitutional. It is time now to get down to the serious business of integration. Surely, it is within the wisdom and ingenuity of the members of the State Board to devise a regulation dealing with attendance areas which will prevent an immediate and unwarranted overcrowding of the facilities of the white schools and, at the same time, upon the showing of good cause, permit a limited number of Negro students to transfer to a white school.

The prayers of the petition are denied. Order upon notice.

At Wilmington,
June 15, 1959.

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* At the time of the filing of the petition for this rehearing there was newspaper publicity quoting the State Superintendent of Public Schools as saying that unless paragraph 4, or equivalent language, were restored to the Plan, "chaos" would result. As a matter of actual fact, for the school year 1959-1960, but 25 Negro children in the entire State (exclusive of Wilmington) have made application to transfer to a white school.

ORDER OF THE DISTRICT COURT.

And Now, to Wit this 6th day of July, 1959, the Court, having held a hearing on the Proposed Plan of School Desegregation of the Board of Education and the State Superintendent of Public Instruction, having considered the arguments, reargurnents and briefs of the attorneys for the parties hereto, and having filed its Opinions herein on April 24, 1959, and June 15, 1959, and the State Board of Education and the State Superintendent of Public Instruction having filed an Amended Plan of Desegregation pursuant to said Opinions on June 22, 1959, it is

Ordered that the State Board of Education and the State Superintendent of Public Instruction be, and they are hereby ordered and directed, to effectuate said plan in every school district of Delaware which has not previously placed in operation a plan of desegregation approved by the State Board of Education.

Further Ordered that each and every school district in the State of Delaware which has not previously placed in operation a plan of desegregation approved by the State Board of Education be and it is hereby ordered and directed to comply with said plan; and it is

Further Ordered that the State Board of Education be and is hereby directed to transmit a copy of this Order and a copy of said Amended Plan as filed with this Court on June 15, 1959, to each and every public school district in the State of Delaware which has not heretofore admitted

pupils under a plan of desegregation approved by the State Board of Education.

/s/ CALEB R. LAYTON, III
JUDGE
7-6-59

APPROVED AS TO FORM:

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Attorney for Plaintiffs

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Attorney for Laurel, Greenwood & Seaford School Districts

PLAN OF SCHOOL DESEGREGATION PURSUANT TO THE OPINIONS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE OF APRIL 24, 1959 AND JUNE 15, 1959.

The State Board of Education and the State Superintendent of Public Instruction, hereby amend the Plan of School Desegregation, heretofore adopted by said Board on January 8, 1959 and revised on February 11 and March 5, 1959, as directed by the Opinions of this Court of April 24, 1959 and June 15, 1959, by eliminating former paragraphs 4 and 5 of said Plan so that said Plan of School Desegregation is as follows:

1. Commencing with the start of the fall term, 1959, and thereafter, all pupils entering Grade 1 in any public school district in the State of Delaware which has heretofore not admitted pupils under a plan of desegregation approved by the State Board of Education shall be admitted on a racially non-discriminatory basis.

2. At the beginning of each succeeding school year pupils shall be admitted to such schools on a racially non-discriminatory basis in the next higher grade until complete desegregation has been effected at a time not later than the school year beginning in 1979.

3. Any public school district in the State of Delaware may admit pupils to additional grades on a non-discriminatory basis at an earlier time on approval of the State Board of Education.

4. Transfers will be considered only for those pupils who are legally domiciled in Delaware. All migrants will be admitted only to ungraded classes to be established by the State Board of Education. Any child who is not legally

domiciled in the district in which admission to school is sought will be considered a migrant.

5. Transportation facilities will be provided according to rules and regulations of the State Board of Education.

Adopted by the State Board of Education June 18, 1959.

GEORGE R. MILLER, JR.
Secretary of the State Board of Education

SUMMARY OF THE FACTS UPON WHICH THE STATE BOARD RELIES

I. The Evidence and the Fact Findings of Both this District Court and the State Board Should Cause This Court to Affirm the Decision Below.

At the outset, we submit that the decisions of both the District Court and the State Board should be affirmed unless the fact findings upon which they rest are clearly erroneous. With respect to the findings of fact of the District Court, it is necessary only to refer this Court to Rule 52 of the Federal Rules of Civil Procedure which provides that the finding of the District Judge should not be set aside unless they are clearly erroneous.

With respect to the decision and judgment of the State Board, in *Kelly, et al. v. Board of Education of the City of Nashville, et al.*, 159 F. Supp. 272, 3 Race Rel. L. Rep. 651 (Middle District, Tenn., 1958), affirmed at — F. 2d — (6 Cir., 1959), the court held that, if the judgment of the school board was clearly erroneous, or if it was not supported by the evidence, the court would be justified in holding that the school board had not carried its burden of proof and in disapproving the school board's plan. In that case, however, the court found that the school board's plan was supported by the evidence and held that it would be an unwarranted invasion of the legally constituted school authority if the court should undertake to set the school board's judgment aside and substitute some other plan. We submit that, in the *Nashville* case, the court merely recognized well-established principles concerning the relationship of the courts to administrative agencies of government. In the *Nashville* case, the court refused to alter a plan providing for desegregation in the first grade and for desegregation of each successive grade in successive years. The court recognized that, where there is a need for such a

delay, courts should approve a gradual plan such as that which the District Court has approved in the case at bar.

The evidence supports Judge Layton's findings, as set forth in his opinion (47b-60b). This same type of evidence was considered by the State Board in formulating its plan (18b). In considering this evidence and Judge Layton's findings based thereon, the Court should keep in mind that the plan before it is not a plan for desegregation of one school district but rather, as ordered by this Court and the District Court in prior proceedings, a state-wide plan.

A. *School Districts.*

The school district organization in Delaware is a hodgepodge. There are fifteen special school districts, eighty-one State Board districts, and the City of Wilmington. A number of these districts are negro school districts (R 114). The negro school districts overlap from one to six white school districts (R 116, 163). Special districts have negro schools (R 116). One white school district includes three negro school districts (26b). The hodgepodge exists as a result of the physical growth of the public school system in Delaware (R 127, 482-484). While the negro districts exist as such, there are no definite boundaries available now (R 127). There are important differences between the various kinds of districts (R 115).

Exhibits 8, 9, and 10 are maps of the three counties of Delaware, showing the white school districts and locations of the various kinds of schools, both white and negro. The negro districts are not shown on the maps because of the indefiniteness of their boundaries. Exhibits 11 (38b) and 12 (43b) show the population by school district and list schools, the school districts, and the various attendance areas. All of these exhibits reflect the overlapping jumble of school districts in Delaware. Any more immediate plan of desegregation will further complicate school management, financing, control, administration, and supervision

27b). These districts not only overlap each other, but overlap county lines in at least two instances (R 245, 246).

The situation with respect to school districts is further complicated by the organization of the schools themselves. Some schools have grades one to three, others one to four, one to eight, or kindergarten through twelfth grade. The standard organization, where it does exist, is a school unit of the first six grades, another for the next three grades, and another for the last three grades of high school (R 87). School districts can only be altered by the General Assembly of Delaware and the State Board is not authorized to alter school district boundaries (13b, 19b, R 246, 482-484). There is no typical school district (33b).

Exhibit 14 (44b) and the testimony in connection therewith, establishes specific examples of the kinds of problems which will arise by reason of the school district organization in the State of Delaware. The plan of the Board will give the Board, local school boards and the General Assembly of the State the time required to effect a planned, orderly, systematic reorganization of the school districts and the schools required by desegregation (14b).

B. *Space.*

There has been a necessary rapid growth of school plants even without desegregation and some schools are so overcrowded that unsatisfactory space elsewhere must be used for school purposes (22b, 23b). Some schools are already overcrowded in every grade (R 432, 439, 444).

Because of the pattern of residential segregation (R 23, 38), to desegregate on any more immediate basis than the plan submitted by the Board would result in extreme overcrowding in particular school districts, while leaving other schools almost vacant in some instances (R 135). For example, there is a negro school in Newport, New Castle County, Delaware, but three hundred negroes who go to that school live in the Marshallton School District. With desegregation, if these negroes are admitted to the nearest school, as is the present Board policy with respect to white

pupils, then the Marshallton School will be greatly overcrowded [Exhibits 11 (38b) and 12 (43b), 13b].

The Middletown School in New Castle County, for example, is already overcrowded and, if there is a non-immediate plan of desegregation, a number of children from the Louis L. Redding School would go to the Middletown School and overcrowd it more, leaving unused space at the Redding School (13b). For further example, negroes from a good part of Kent County attend the William Henry Negro School in Dover; and, if these persons attend the nearest school to them, the William Henry School will be almost vacant (13b, 14b).

For further example, persons attending the Frankfort Negro School in Sussex County, would probably attend the Lord Baltimore and Clayton Schools, if permitted to attend a white school, with the result that there would be few, if any, attending the Frankfort School and the Lord Baltimore and Clayton Schools would be overcrowded (13b, 16b). If the two one-room negro schools in Townsend were closed because the students went to white schools, the population of the white schools in Townsend would be increased by forty percent (17b).

To desegregate high schools would overcrowd four of the five high schools in Sussex County (R 211, 212). The Caesar Rodney School is now so overcrowded that white students have been sent to an abandoned school in Wyoming (R 262). Yet, Exhibit 14 (44b) shows that the Caesar Rodney School population would be increased by ten percent.

Exhibit 14 (44b) reflects, for example, that the Houston School District population would be increased by thirty-nine percent, the Kenton School District by fifty-two percent, the Bridgeville District schools by seventy-three percent and thirty-four percent, the Ellendale School District by sixty-two percent and the Millsboro District schools by sixty-eight and forty-two percent and the Selbyville District schools by sixty percent and thirty-two percent.

C. *Finances.*

Schools in Delaware are financed largely by the State. The serious financial condition of the State government is so widely known and indisputable that judicial notice was taken of it. The expenses of negro schools both for operation and construction are paid one hundred percent by the State (R 7, 28). No negro school district has ever raised money for either purpose (12b). With respect to white school construction, the State pays sixty percent and the school district, forty percent of the costs (12b). The money furnished to white school districts for operation of the schools is supplemented in forty-six districts by local taxes which must be approved by a vote of the residents of the district (R 116, 117).

There has been an extensive growth of schools even without desegregation (22b). The residents of the school districts would have to vote even more funds more quickly if a more immediate plan of desegregation is approved (R 118, 28b, 29b). This applies both to school construction and school operation (19b, 20b). Exhibit 14 (44b) reflects examples of the kinds of construction costs involved in sample school districts. The cost for school construction alone approximates thirty thousand dollars per room, and in the districts shown, from two additional rooms in the smaller districts to thirteen additional rooms in a larger district, would be required. These costs do not include the costs of all other additional facilities, personnel and services.

The plan of the Board spreads the impact of these necessary finances over a longer period of time (R 122, 123) and gives the school districts the opportunity to seek relief from the General Assembly of the State (16b). A gradual plan will best insure public support and financing (R 224).

D. *Other Obstacles.*

Obviously, any more immediate plan of desegregation would require the use of emergency facilities rather than to permit desegregation to take place in an orderly, effective,

systematic manner insofar as school plant is concern
These crowded conditions would also place serious burd
on equipment, facilities, materials, and various types of s
ices such as health, psychiatric and psychological servi
(19b, 28b, 29b, 30b, 31b). Further overcrowding of sch
would seriously affect teacher-pupil ratio to the detrim
of the overall educational system (R 54, 55, 434). Furth
overcrowding will increase teacher shortages and cre
problems of teacher selection and employment and ot
personnel problems (24b, 30b-32b). A more immediate p
will require changes in the education program (26b) a
will seriously disrupt the learning process of the pup
(23b, R 472).

Exhibit 2 is a frequency table reflecting the differe
in scores between white and negro children on the Standa
Otis Quick Scoring Test of Mental Ability. The test h
been used throughout the United States for many ye
(R-85). This exhibit shows that thirty-six percent of t
white children made scores above the so-called normal I.
range and only six percent of the negro children did
(R 281). The exhibit also shows that thirty-six percent
the negro children made scores below the so-called norm
I. Q. range and only eleven percent of the white childr
did so. The median score for the white children was o
hundred and five whereas the median score for negro ch
dren was only nine-two. These differences are signific
I. Q. differences (R 86). The overall scores are suppor
by the results in individual school districts (R 40).

Exhibit 1 (35b) is a compilation of the comparison
the averages of the Stanford Achievement Test results
grades two through eight in eighty-one of the school d
tricts in Delaware, both white and negro, for the years 19
through 1958. The exhibit shows that, in the second gra
the negro children lag behind the white children by seven
eight months. It shows also that this difference increa
as the children progress from grade three through eig
Exhibit 3A (36b) is a letter of instructions of Standa

Average Letter Ratings which has been used in grading in negro schools. Exhibit 3B (37b) is the same set of instructions used in white schools. These exhibits reflect the fact that, because of the lower achievement level of negro children, they must be given a higher letter rating for a lower score than the white children (10b, 11b).

These exhibits show that, if a more immediate plan of integration were adopted, five times as many negro children would flunk out of school if the average letter ratings for white children were applied to the integrated school. To prevent this from happening the educational standards of the schools would have to be lowered (11b).

The results of these tests, as one of plaintiffs' witnesses testified, are important with respect to management and control of schools, the impossible situation which would be created for teachers and other difficult problems which would arise (R 334). If the educational level is not to be lowered, the types of teaching will have to be altered, more special sections for slower pupils will be required, teachers of special types will have to be employed, and an internal reorganization of each school may be required (R 41, 10b, 19b, 20b). Further, the creation of special sections would, of course, require additional space, facilities, equipment and so on.

Adopting a plan of desegregation which begins with the first grade and provides for integration of successive grades in successive years and for more immediate desegregation if local boards deem it advisable, will tend to reduce these difficulties since the children beginning with the first grade will receive the same or similar training, since first grade children have fewer educational and other differences, and since the time required to ascertain the extent of the changes necessary and to provide the space, facilities, and teachers required will be made available by the gradual plan (R 190).

A more immediate plan of desegregation, since segregation exists in the rest of the community, could not elim-

inate segregation in extracurricular activities (9b) a extracurricular activities might have to be abandoned the program altered (20b, R 471). Extracurricular a tivities are particularly important in the rural school d tricts involved since such activities take the place of so and other events of the more urban areas of the State (24

Because of community attitudes, disciplinary probl would result from the adoption of any more immediate pl (23b, 30b) and petty bickering, fighting, morale proble and an upsetting of the total school program is a lik result of a more immediate plan (R 42).

A gradual plan will provide the time necessary for gradual solution of administrative problems such as t dealing with the scheduling of classes, the planning of ed cational programs and the employment and assignment teachers (14b-16b).

The foregoing facts are merely examples which a curately reflect the overall problem (20b, 21b).

E. *Good Faith.*

Kent and Sussex Counties are rural agricultural ar with small towns (R 7). There is segregation of whites a negroes in virtually every area of conduct in these Coun (R 9, 23). These deep-rooted customs, traditions, insti tions and behavior patterns have existed for one hundr fifty years (R 10). There are no other racial or religio groups in these areas (R 11, 23, 30). This pattern confor to that of other rural areas in the United States (R 32 These facts contrast with the situation in the upper end the State, in northern New Castle County (R 56). Previ incedents involving desegregation of schools in lower De ware have resulted in boycotts, disorder, threats, closing schools, general turmoil and lack of administrative cont in the schools involved (R 35, 36, 155-160).

Hate literature is distributed in Kent and Sus Counties (R 38, 161). There has been no support to ne students from service groups such as existed before t

school desegregation problem arose (R 39). Feelings are so strong that, if white students were ordered to a negro school, the Board of Trustees of the school involved and the school superintendent would probably have to resign (R 267). If a negro teacher were assigned to a white school in these areas, riots would probably occur. Any more immediate plan than that before the Court would not be peaceably accepted, would probably result in boycotts, riots, violence and disturbances (R 16, 25, 31, 472). A gradual plan would tend to lessen public hostility (R 192).

While previous court opinions in preliminary matters in these cases, without all of the evidence before the courts, may have indicated to the contrary, a trial having been had, the evidence established the good faith of the Board.

After the May 17, 1954, decision of the United States Supreme Court, in *Brown v. the Board of Education of Topeka*, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873, and before the decision in the same case on May 31, 1955, reported at 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083, the Board, on June 9, 1954, requested local boards to submit desegregation plans (Exhibit 6). On June 11, 1954, the Board adopted an overall policy regarding desegregation of all public schools in Delaware and announced the same publicly (Exhibit 4). On August 26, 1954, the Board requested local boards to submit their proposals or reports of their status not later than October 1, 1954 (Exhibit 16). By September 7, 1954, twenty-eight percent of the total negro school population in Delaware was attending desegregated schools and the Board was pressing local school districts for desegregation plans (Exhibit 5). Desegregation which did occur was a direct result of the acts of the Board (R 325).

However, apparently the mandate of the United States Supreme Court of May 31, 1955, in the second *Brown* case, which recognized the need for time to accomplish desegregation in a systematic, effective and orderly manner, slowed the process in Delaware (Exhibit 7). For example, the General Assembly of the State failed to pass necessary laws redistricting the schools (Exhibit 7).

Nothing establishes the good faith of the Board much as the fact that, in September of 1954, in the face a mob, representatives of the Board personally operated desegregated school in Milford in a critical situation wh involved international headlines (R 155, 156).

While there had been a considerable delay between t mandate of the United States Supreme Court in the seco *Brown* case and the Fall Term of 1959, the record in th litigation establishes that the Board considered the prepara tion of desegregation plans to be the responsibility of t local school districts in view of the *Brown* cases, and t Board's function as one of rendering assistance to the loc districts in the formulation of these plans (R 244). It wa not until the law was established to the contrary in th litigation that the Board realized that it had the duty prepare a uniform statewide desegregation plan (R 24

The Board has studied many other plans and conclud that they are not justified educationally in the area in volved (R 193). It is significant that fifty of the seven plans studied are gradual plans (18b). Generally, gradu plans have been adopted in that area of the State in whi desegregation has been effected (R 177). In the urban area of the State, for example, in Wilmington, where there one school district which is permitted to raise funds with a vote of the residents and where a twelve-year period wa involved in preparing for and effectuating the plan, the has been no serious problem (R 328-332). Compare plai tiffs' version of this evidence (PB 14) with the recor Further, in urban areas where the negro population is t large, as in the Claymont area of New Castle County, the have been no problems with a more immediate pla (R 341-2). Compare plaintiffs' version of this evide (PB 14) with the record.

However, the plan before the Court is a state-wide pla the only such state-wide plan which has been considered t parently by any State and, therefore, the difficulties involv are made increasingly complex (33b). The gradual pla

before the Court will permit uniformity of desegregation throughout the State (14b). It is highly significant, despite the customs, traditions, and behavior patterns found to exist, that at least one hundred thirty-five to one hundred fifty local school board members have expressed their support for the plan before the Court (Exhibit 13, R 176). The president of the State Parent-Teacher Association, who testified as an individual and who formerly favored a more immediate plan in a school district in New Castle County, has expressed his strong views in favor of the gradual plan before the Court (R 222-224). The gradual plan will provide a more orderly, systematic, effective transition in the portions of the State not yet desegregated, than any more immediate type of plan (R 45).

Most of the plaintiffs in this litigation have graduated from or quit the public school system in Delaware (R 179).

Prejudices and similar feelings are learned and pupils in the first grade have not ordinarily learned them (R 190, 191). The Superintendent of Public Instruction summarized a portion of the justification for the one-grade-a-year plan, starting with the first grade (R 190), as follows:

> "Our justification was that the children, both negro and white, would be much more on a par, much more on a level. They would be subject to fewer prejudices and therefore the adjustments would be much easier to make in living together and working together; and we know, of course, from the results of tests that there is—in achievement tests our own achievement tests prove that there is very little difference—I mean a lesser difference on the lower grade levels than the difference as you move up through the grades, and I think that was our primary justification on an educational basis, feeling that a transition like this could be much more readily made and much more easily made if these children started on a par; not only in justice to the children, but also the teachers in the school."

OPINION OF THE COURT

(Filed July 19, 1960)

By Biggs, *Chief Judge*:

The background of these appeals is stated in Evans v. Buchanan, 152 F. Supp. 886 (D. Del. 1957), and 256 F. 2d 688 (3 Cir. 1958). After our remand, the court below directed the defendant, the State Board of Education of Delaware, and the defendant, George R. Miller, Jr., State Superintendent of Public Instruction, to submit to it a plan of desegregation. A proposed plan was submitted and was approved with certain modifications. See Evans v. Buchanan, 172 F. Supp. 508, and 173 F. Supp. 891. On July 6, 1959, the court below entered a final order approving the plan. This is the order appealed from.

It is sufficient to state here that the plan as approved provides for the desegregation of the Delaware Public School System on a grade-by-grade basis over a period of 12 years beginning with all first grades at the Fall term 1959. The plaintiffs-appellants object to this plan on two grounds. First, they assert that the plan is not in accord with the mandate of this court which they say in substance approved the order of Judge Leahy entered in the court below on July 15, 1957, and which in their view required immediate state-wide desegregation in all school districts and all grades. Cf. our opinion at 256 F. 2d 688. The plaintiffs' second objection is that the plan as approved by the court below does not follow the intent and substance of the decisions of the Supreme Court in Brown v. Board of Education of Topeka, 347 U. S. 483 (1954) and 349 U. S. 294 (1955), in that the plan does not effect desegregation "with all deliberate speed" and is not a "reasonable start toward full compliance" with the ruling of the Supreme Court in the Brown opinion of May 17, 1954.

In its opinions the court below has reached the conclusion that the plan approved is a necessary and practical, if not the only feasible, one, and that integration at a more

rapid rate would overcrowd the schoolrooms, overtax the teachers, and have a most undesirable emotional impact on some of the socially segregated communities of Delaware. The court below concluded in substance that desegregation at a more rapid rate than that approved by it would prove to be a disruptive and futile proceeding which might do great harm to the Delaware School System.

We cannot agree. We affirmed the decree of Judge Leahy which in plain terms required statewide integration of the public school system of Delaware in all classes by an adequate plan by the Fall term 1957, and which enjoined designated defendants from refusing admission to Negro children on a racially discriminatory basis. The plan approved by the court below is *not* in accordance with Judge Leahy's decree or with the mandate of this court. Desegregation of the Delaware public school system on a grade-by-grade basis over a period of 12 years, beginning as it did in the Fall of 1959, does not follow the intent and substance of the rulings of the Supreme Court in Brown v. Board of Education of Topeka, *supra*.

The plan, and the evidence of many of its proponents seem to us to be fraught with unreality, though undoubtedly the witnesses, the defendants, and indeed all concerned, have acted in good faith. It appears from Exhibit No. 11, "Population by School Districts and High School Areas, January 1959", that the approximate number of Negro children available for desegregation in Delaware was 6,813 and that the number of Negro children eligible or available for desegregation in the first grades as of that date was approximately 1,000. The affidavit of June 10, 1959, of Superintendent Miller, states that the number of Negro children applying for entrance into the first grades of those "White Schools", which previously had not had plans for desegregation approved by the State Board of Education, amounted to only 25.[1] Percentage-wise, therefore, the num-

1. Reference to this fact is made in the star note to Judge Layton's supplemental opinion, 173 F. Supp. at p. 892.

ber of Negro children who registered for entrance into first grades in the Fall of 1959 was approximately 2.5 those available as set out in Exhibit No. 11.[2] If the same percentage be applied to the 6,813 Negro children referred in Exhibit 11; *viz.*, if 2.5% of 6,813 be taken, 170 Negro pupils would have registered from grades 1 to 12 inclusive. Even if this number be trebled the number of Negro children involved if desegregation took place through grades 1 to 12 would barely exceed 500. Doubtless there would be some overcrowding in particular schools as suggested by State Exhibit 14 and many temporary or permanent rearrangements in school facilities relating to teachers, school houses, school rooms, and transportation would have to be made, but it is unrealistic to suggest that all Negro pupils now in segregated schools would immediately seek admission to desegregated schools. The fact that there must be deemed to be a diminution in the number of Negro children seeking integration, *viz.*, in the number seeking immediate integration as estimated by some of the defendants, is indicated by the fact that of the 42 infant plaintiffs who originally sought relief, approximately 24 have ceased to be active plaintiffs and no longer seek to be integrated. Some of these 24 doubtless have graduated but even if we assume that the number graduating amounts to 10% of the total it is clear that the number of active plaintiffs still seeking integration is approximately only 20. It has been the experience in school desegregation that a large number of

2. It should be pointed out, however, that the figure of 2.5% Negro children, given by Exhibit 11, is an estimate based on the number of Negro children who had entered the first grades in the fall 1958, whereas the total of 25 Negro children represents the actual number who registered in June 1959, for entrance in September 1959 to the first grades in "White Schools", which previously had not had plans for desegregation approved by the State Board of Education.

We do not have in the record the exact number of Negro children eligible or available for entrance into the first grades on a non-segregated basis in September 1959, but we are of the opinion that the "Population" figures given in Exhibit 11 are close to the number of Negro children available for desegregated entry into the first grades and that only about 2.5% of these children applied for such entry

Negro children do not seek integration even when offered the opportunity. This is common knowledge. We cannot conclude that the situation in Delaware will be noticeably different in this respect than in other critical areas the schools of which already have been successfully integrated. It is the fact that if the plan as approved by the court below be not drastically modified a large number of the Negro children of Delaware will be deprived of education in integrated schools despite the fact that the Supreme Court has unqualifiedly declared integration to be their constitutional right. We cannot believe that such a result is a correction of just one.[3]

As we have indicated one of the main thrusts of the opinion of the court below is that the emotional impact of desegregation on a faster basis than that ordered would prove disruptive not only to the Delaware School System but also to law and order in some of the localities which would be affected by integration. We point out, however, that approximately 6 years have passed since the first decision of the Supreme Court in Brown v. Board of Education of Topeka, *supra*, and that the American people and, we believe, the citizens of Delaware, have become more accustomed to the concept of desegregated schools and to an integrated operation of their School Systems. Concededly there is still some way to go to complete an unqualified acceptance, but we cannot conclude that the citizens of Delaware will create incidents of the sort which occurred in the Milford area some five years ago. We believe that the people of Delaware will perform the duties imposed

3. Evidence has been introduced to the effect that the intelligence of Negro children in Delaware as demonstrated by intelligence and aptitude tests is less to some degree than that of Caucasian children. We have examined this evidence carefully and we conclude that the asserted disparity in intelligence between Negro and Caucasian children is not of such a degree as to prevent or even to hinder substantially their mutual desegregated education. Some adjustments may be necessary from grade to grade but this is a matter which the competent Delaware school authorities will be able to handle adequately administratively.

on them by their own laws and their own courts and will not prove fickle to our democratic way of life and to our republican form of government. In any event the Supreme Court has made it plain in Cooper v. Aaron, 358 U. S. 1, 16 (1958), the so-called "Little Rock case", that opposition is not a supportable ground for delaying a plan of integration of a public school system. In this ruling the Supreme Court has acted unanimously and with great emphasis stating that: "The constitutional rights of respondents [Negro school children of Arkansas seeking integration] are not to be sacrificed or yielded to . . . violence and disorder . . .". We are bound by that decision.

Doubtless integration will cost the citizens of Delaware money which otherwise might not have to be spent. The education of the young always requires, indeed demands, sacrifice by the older and more mature and resolute members of the community. Education is a prime necessity of our modern world and of the State of Delaware. We cannot believe that the citizens of Delaware will prove unworthy of this sacred trust.

In Lucy v. Adams, 350 U. S. 1 (1955), the Supreme Court indicated, as we have never doubted, that individual plaintiffs in a class suit such as those at bar, have a personal right to immediate enforcement of their claims if such be feasible. We can perceive no reason why the individual infant plaintiffs who presently actively seek integration should not be granted that right immediately.

For the reasons stated we disapprove the plan insofar as it postpones full integration. The judgment appealed from will be vacated. The court below will be directed to enter an order requiring the State Board of Education of Delaware and the State Superintendent of Public Instruction to submit to the court below on or before December 1, 1960, for its approval a modified plan which will provide for full integration of all grades of the public schools of Delaware commencing with the Fall term 1961. The court below also will be directed to order the individual defend-

ants, respectively members of the Boards of Trustees or of the Boards of Education in the School Districts as named above, to integrate commencing with the Fall term 1960, the respective individual infant plaintiffs who presently actively seek integration. The court below also will be directed to enter an order requiring, except as hereinbefore provided with respect to the individual infant plaintiffs, the continuation of the grade-by-grade integration presently in effect until the modified plan providing for full integration as contemplated by this opinion be put in operation.

GOODRICH, *Circuit Judge*, dissenting.

This is a difficult case to decide. Much harder, for instance, than to determine whether a given profit is ordinary income or capital gain. The reason that it is hard is because the test for its solution is not capable of being stated in categorical terms. The direction is to proceed with desegregation with all deliberate speed. The school authorities in this case may well be charged with proceeding with more deliberation than they have with speed.

Nevertheless, I am unable to join with my colleagues in the order which they propose. It would be better, perhaps, if the program submitted to the district judge and approved by him had provided for speedier integration. But a plan was submitted and a plan was approved and has been put into effect. While it will take a comparatively long time before it is completed it, nevertheless, provides for steady progress. It seems to me that in view of the local social inertia against any plan at all that the one submitted and approved is as good as we can expect in view of the obstacles to be overcome in making it work. I would, therefore, affirm the judgment of the district court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS.
FOR THE THIRD CIRCUIT

No. 13,018

Mary Ann Evans, an infant, by Helen Evans, her guardian ad litem; Oklyn Brown, Jr., an infant, by Oklyn Brown, his guardian ad litem; Shirley Gay, an infant, by Nelson Gay, her guardian ad litem; Herman Murray, an infant, by Ella Murray, his guardian ad litem; Jacqueline Simmons, an infant, and Vincent Simmons, an infant, by Lillian Faust, their guardian ad litem; Delphain Simmons, an infant, and Sherry Wilson, an infant, by Alpain Wilson, their guardian ad litem; Helen Evans, Oklyn Brown, Nelson Gay, Ella Murray, Lillian Faust and Alpain Wilson,

Appellants,

v.

Jane Ennis, Vincent A. Theisen, Marvel O. Watson, E. A. Wentz, Ralph Grapperhaus, Harold B. Evans, Members of the State Board of Education; George R. Miller, Jr., State Superintendent of Public Instruction; Richard W. Comegys, Harry W. Moore, G. Fred Downs, Mary W. Jarrell, Members of the Board of Trustees of Clayton School District No. 119,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Present: BIGGS, *Chief Judge* and GOODRICH and KALODNER, *Circuit Judges*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby vacated, with costs, and the cause remanded to the District Court with directions to:

(1) enter an order requiring the State Board of Education of Delaware and the State Superintendent of Public Instruction to submit on or before December 1, 1960 for the approval of the District Court a modified plan which will provide for full integration of all grades of the public schools of Delaware, commencing with the Fall Term 1961;

(2) order the individual defendants, respectively members of the Boards of Trustees or of the Boards of Education in the School Districts as named above, to integrate, commencing with the Fall Term 1960, the respective individual infant plaintiffs who presently actively seek integration;

(3) enter an order requiring, except as hereinbefore provided with respect to the individual infant plaintiffs, the continuation of the grade-by-grade integration presently in effect until the modified plan providing for full integration as contemplated by the opinion of this Court be put in operation.

Attest

IDA O. CRESKOFF,
Clerk.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,919

Eugene Harris, an infant, by Thomas Harris, his guardian ad litem; Thomas Harris,

Appellants,

v.

Jane Ennis, Vincent A. Theisen, Marvel O. Watson, R[illegible] A. Wentz, Ralph Grapperhaus, Harold B. [illegible], Members of the State Board of Education; George R. Miller, Jr., State Superintendent of Public Instruction; Max R. Corder, E. Crerar Bennet, Jr., Ernest [illegible] Macklin, George A. Robbins, Members of the Board of Education of the Milford Special School District.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Present: BIGGS, *Chief Judge* and GOODRICH and KALODNER, *Circuit Judges*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby vacated.

with costs, and the cause remanded to the District Court with directions to:

(1) enter an order requiring the State Board of Education of Delaware and the State Superintendent of Public Instruction to submit on or before December 1, 1960 for the approval of the District Court a modified plan which will provide for full integration of all grades of the public schools of Delaware, commencing with the Fall Term 1961;

(2) order the individual defendants, respectively members of the Boards of Trustees or of the Boards of Education in the School Districts as named above, to integrate, commencing with the Fall Term 1960, the respective individual infant plaintiffs who presently actively seek integration;

(3) enter an order requiring, except as hereinbefore provided with respect to the individual infant plaintiffs, the continuation of the grade-by-grade integration presently in effect until the modified plan providing for full integration as contemplated by the opinion of this Court be put in operation.

Attest

IDA O. CRESKOFF,
Clerk.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,020

Julie Coverdale, an infant, by Annie E. Coverdale, her guardian ad litem; Lula Collins, an infant by Lewis Smith, her guardian ad litem; Phillis Haines, an infant by John W. Haines, her guardian ad litem; Lewis Smith, an infant, by Ike Smith, his guardian ad litem; Annie E. Coverdale, Lewis Smith, John W. Haines and Ike Smith,

Appellants

v.

Jane Ennis, Vincent A. Theisen, Marvel O. Watson, R. A. Wentz, Ralph Grapperhaus, Harold B. Enslow, Members of the State Board of Education; George R. Miller, Jr., State Superintendent of Public Instruction; Wilbur C. Root, Norman C. Minsted, Harry Will, Marjorie Balsor, Members of the Board of Trustees, Greenwood School District No. 91.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Present: BIGGS, *Chief Judge* and GOODRICH and KALODNER, *Circuit Judges*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Dis-

trict Court in this case be, and the same is hereby vacated, with costs, and the cause remanded to the District Court with directions to:

(1) enter an order requiring the State Board of Education of Delaware and the State Superintendent of Public Instruction to submit on or before December 1, 1960 for the approval of the District Court a modified plan which will provide for full integration of all grades of the public schools of Delaware, commencing with the Fall Term 1961;

(2) order the individual defendants, respectively members of the Boards of Trustees or of the Boards of Education in the School Districts as named above, to integrate, commencing with the Fall Term 1960, the respective individual infant plaintiffs who presently actively seek integration;

(3) enter an order requiring, except as hereinbefore provided with respect to the individual infant plaintiffs, the continuation of the grade-by-grade integration presently in effect until the modified plan providing for full integration as contemplated by the opinion of this Court be put in operation.

Attest

IDA O. CRESKOFF,
Clerk.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,021

Eyronne Holloman, an infant, by Flossie Holloman, her guardian ad litem; Mary Allen, an infant, by Charles Allen, her guardian ad litem; James Harris, an infant, by Edna Harris, his guardian ad litem; Flossie Holloman, Charles Allen, and Edna Harris,

Appellants,

v.

Jane Ennis, Vincent A. Theisen, Marvel O. Watson, Ralph A. Wentz, Ralph Grapperhaus, Harold B. Engle, Members of the State Board of Education; George R. Miller, Jr., State Superintendent of Public Instruction; Howard T. West, John T. Fisher, Norman Clifton, Albert Lank, Members of the Board of Trustees of Milton School District No. 3.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Present: BIGGS, *Chief Judge* and GOODRICH and KALODNER, *Circuit Judges*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Dis-

trict Court in this case be, and the same is hereby vacated, with costs, and the cause remanded to the District Court with directions to:

(1) enter an order requiring the State Board of Education of Delaware and the State Superintendent of Public Instruction to submit on or before December 1, 1960 for the approval of the District Court a modified plan which will provide for full integration of all grades of the public schools of Delaware, commencing with the Fall Term 1961;

(2) order the individual defendants, respectively members of the Boards of Trustees or of the Boards of Education in the School Districts as named above, to integrate, commencing with the Fall Term 1960, the respective individual infant plaintiffs who presently actively seek integration;

(3) enter an order requiring, except as hereinbefore provided with respect to the individual infant plaintiffs, the continuation of the grade-by-grade integration presently in effect until the modified plan providing for full integration as contemplated by the opinion of this Court be put in operation.

Attest

IDA O. CRESKOFF,
Clerk.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,022

David Creighton, an infant, by Josephine Creighton his guardian ad litem; Josephine Creighton,

Appellants

v.

Jane Ennis, Vincent A. Theisen, Marvel O. Watson, Ernest Wentz, Ralph Grapperhaus, Harold B. English, Members of the State Board of Education; George R. Miller, Jr., State Superintendent of Public Instruction; Ford M. Warrington, Otis P. Garmins, Clarence Evans, Homer L. Bisharoon, Jr., Members of The Board of Education of the Laurel Special School District

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Present: BIGGS, *Chief Judge* and GOODRICH and KALODNER, *Circuit Judges*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby vacated, with costs, and the cause remanded to the District Court with directions to:

(1) enter an order requiring the State Board of Education of Delaware and the State Superintendent of Public Instruction to submit on or before December 1, 1960 for the approval of the District Court a modified plan which will provide for full integration of all grades of the public schools of Delaware, commencing with the Fall Term 1961;

(2) order the individual defendants, respectively members of the Boards of Trustees or of the Boards of Education in the School Districts as named above, to integrate, commencing with the Fall Term 1960, the respective individual infant plaintiffs who presently actively seek integration;

(3) enter an order requiring, except as hereinbefore provided with respect to the individual infant plaintiffs, the continuation of the grade-by-grade integration presently in effect until the modified plan providing for full integration as contemplated by the opinion of this Court be put in operation.

Attest:

IDA O. CRESKOFF,
Clerk

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,923

Marvin Denson, an infant, by Clarence Denson, his guardian ad litem; Pensasela Camper, an infant, by Joyce Camper, her guardian ad litem; Ethel Fountain, an infant, by Ivory Fountain, her guardian ad litem; Lorraine Perkins, an infant, by Fred Perkins, his guardian ad litem; Rosemary Smith, an infant, by Mary Lee Smith, her guardian ad litem; Elizabeth Wilson, an infant, by Beatrice Wilson, her guardian ad litem; Clarence Denson, Joyce Camper, Ivory Fountain, Fred Perkins, Mary Lee Smith and Beatrice Wilson

Appellants

v.

Jane Ennis, Vincent A. Theisen, Marvel O. Watson, Ruth Wentz, Ralph Grappenhaus, Harold B. Fredericks, Members of the State Board of Education; George R. Miller, Jr., State Superintendent of Public Instruction; Robert H. Stamm, Irene F. Larrimore, Oscar W. [illegible], Jr., John C. Rawlins, Members of the Board of Education of the Seaford Special School District.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Present: Biggs, *Chief Judge* and Goodrich and Kalodner, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby vacated, with costs, and the cause remanded to the District Court with directions to:

(1) enter an order requiring the State Board of Education of Delaware and the State Superintendent of Public Instruction to submit on or before December 1, 1960 for the approval of the District Court a modified plan which will provide for full integration of all grades of the public schools of Delaware, commencing with the Fall Term 1961;

(2) order the individual defendants, respectively members of the Boards of Trustees or of the Boards of Education of the School Districts as named above, to integrate, commencing with the Fall Term 1960, the respective individual infant plaintiffs who presently actively seek integration;

(3) enter an order requiring, except as hereinbefore provided with respect to the individual infant plaintiffs, the continuation of the grade by grade integration presently in effect until the modified plan providing for full integration as contemplated by the opinion of this Court be put in operation.

Attest

IDA O. CRESKOFF,

Clerk

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,024

Thomas J. Oliver, Jr., an infant, by Thomas J. Oliver, his guardian ad litem; Leroy Robinson, an infant, by Matilda Andrews, his guardian ad litem; Thomas J. Oliver and Matilda Andrews,

Appellants

v.

Jane Ennis, Vincent A. Theisen, Marvel O. Watson, Lloyd Wentz, Ralph Grapperhaus, Harold B. Embleton, Members of the State Board of Education; George R. Miller, Jr., State Superintendent of Public Instruction; Raymond Townsend, George H. Bunting, William Chandler, Jr., Roland V. Cobb, members of the Board of Trustees of John M. Clayton School District No. 97

On Appeal From the United States District Court for the District of Delaware

Present: Biggs, *Chief Judge* and Goodrich and Kalodner, *Circuit Judges*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said

District Court in this case be, and the same is hereby vacated, with costs, and the cause remanded to the District Court with directions to:

(1) enter an order requiring the State Board of Education of Delaware and the State Superintendent of Public Instruction to submit on or before December 1, 1960 for the approval of the District Court a modified plan which will provide for full integration of all grades of the public schools of Delaware, commencing with the Fall Term 1961;

(2) order the individual defendants, respectively members of the Boards of Trustees or of the Boards of Education of the School Districts as named above, to integrate, commencing with the Fall Term 1960, the respective individual infant plaintiffs who presently actively seek integration;

(3) enter an order requiring, except as hereinbefore provided with respect to the individual infant plaintiffs, the continuation of the grade-by-grade integration presently in effect until the modified plan providing for full integration as contemplated by the opinion of this Court be put in operation.

Attest

IDA O. CRESKOFF,
Clerk.

PETITION FOR REHEARING

The State Board of Education and the State Superintendent of Public Instruction hereby petition for rehearing of the above-entitled case for the reasons that:

(1) The Court erred in holding that the State Board's plan does not meet the "deliberate speed" test of the *Brown* cases. A twelve-year plan was held to meet this test in *Kelly, et al. v. The Board of Education of the City of Nashville, et als.*, 270 F. 2d 209 (6 Cir., 1959) and the United States Supreme Court denied certiorari at 4 L. Ed. 2d 244. We respectfully submit that, since the *Nashville* case is based upon similar facts, this Court should have followed the United States Court of Appeals for the Sixth Circuit in approving the findings of the school board and District Court and in refusing to substitute its judgment for that of the State Board.

(2) In *Brown v. Board of Education of Topeka*, [illegible] U. S. 294, 99 L. Ed. 1083, 75 S. Ct. 753, 756 (1955), the United States Supreme Court held that ". . . School authorities have the primary responsibility for elucidating, assessing, and solving these problems. . . ." While this Court has found that Appellees have acted in good faith, nevertheless the Court has substituted its judgment for that of the school authorities and, in so doing, we respectfully submit, has ignored not only the *Brown* case but also the findings of an administrative agency of the State of Delaware and of the United States District Court for the District of Delaware.

(3) The State Board is aware, as this Court's opinion states (page 9), that education costs money and requires sacrifices by the older members of the community. It was for this reason, as the undisputed record shows, that the gradual plan of the State Board was devised to spread the great cost over a longer period of time as well as to

the State time to solve the innumerable other obstacles which the undisputed evidence proves will be caused by desegregation of schools, as set forth in the State Board's brief commencing at page 7. The State Board respectfully submits that this Court's order deprives the State Board of the time required to solve these problems, as provided by the United States Supreme Court in the *Brown* cases.

(4) We respectfully submit that, in holding the State Board's gradual plan to be too slow, this Court has failed to give proper weight to the fact that the State Board's plan is a state-wide plan and the only state-wide plan for insuring steady progress in the desegregation of all of the schools in a State.

(5) The Court erred (Opinion, page 8) in ignoring the findings of the District Court, which are supported by undisputed evidence, concerning acceptance by the people of Delaware of an immediate plan of desegregation.

(6) We submit that there is no evidence of record to support this Court's finding (Opinion, page 6) that Negro children, eligible for admission to Delaware "White" schools under the Court's opinion, will or will not apply for such admission. However, whether or not such applications are made, school authorities must be prepared for such applications and admissions. The result is, we respectfully submit, that the Court has allowed the State only about one year to solve the many problems presented by an immediate desegregation of Delaware schools. These obstacles and the undisputed record evidencing them are set forth in the State Board's brief, commencing at page 7.

(7) In concluding that the plan of the State Board of Education was not in accordance with the plain terms of the decree of Judge Leahy, affirmed by this Court, we respectfully submit that the Court (Opinion, page 6) must have failed to consider Judge Leahy's explanation of the meaning of his decree, as set forth in the brief filed by the Milford,

Seaford, Laurel, and Greenwood local boards, commencing at page 2b, and in reliance upon which explanations motions to amend Judge Leahy's decree were withdrawn by the local boards, page 1b.

(8) We respectfully submit that the Court erred in holding that appellants have an immediate personal right, for the reasons set forth in the State Board's brief at page 21, and particularly because the *Brown* cases gave appellants no immediate right to admission to "White" schools but only a right to such admission upon the elimination of the obstacles thereto with "deliberate speed."

Because of the importance of this Court's decision to the people of Delaware, as well as to the people of many other states, and because of the conflict between this Court's decision and that of the United States Court of Appeals for the Sixth Circuit, we respectfully ask the Court to grant this petition and, if possible, to grant rehearing by the Court *en banc*.

Pending a decision on this Petition, and a decision on rehearing if the Petition is granted by the Court, we respectfully ask the Court to stay its judgments in each of the aforesaid appeals.

Respectfully submitted,

JAMES D. BOYER, JR.,
Attorney General of the State of
Delaware,
*Attorney for the State Board of
Education and the State Superintendent of Public Instruction*

OPINION ON PETITIONS FOR REHEARING.

(Filed August 29, 1960)

By Biggs, *Chief Judge*.

We have imposed a hard task on the State Board of Education of Delaware, on the State Superintendent of Public Instruction, on the other defendants and indeed on the citizens of Delaware for there is a hard task to be done. Adequate education is a duty owed to youth by the community. It is more than this. It is an essential for national survival in the years to come. But the task is not as difficult as the defendants insist. We demonstrated in our opinion of July 19, 1960, that the number of Negro children available for integration in the schools of Delaware is far greater than the number of Negro children who will presently seek integration. In that opinion we pointed to the key fact that only 25 Negro children of approximately the 1,000 available for integration at the first grades, registered for admission at the Fall term 1959. We accentuated the fact that if the same percentage, 2.5%, were applicable to the Negro children seeking integration into all other grades, the number of Negro children seeking integration would be 179, and that even if that number were trebled it would barely exceed 500. See note 2 to that opinion. The petitions for rehearing make no reference whatsoever to this key situation.

The State Board of Education, the State Superintendent of Public Instruction and other defendants persist in their position that to grant the relief sought by the plaintiffs will require the immediate integration of approximately 6813 Negro children into the Delaware school system. This is not the task which is imposed on them under our decision. The primary duty that was placed on the State Board of Education and the State Superintendent of Public Instruction was to create a plan by De-

cember 1, 1960 whereby those Negro children who seek integration might achieve that end by the commencement of the Fall term, 1961. The number of Negro children who will seek such integration will be a comparatively small one and their integration can be accomplished without great difficulty.

As we said in our July 19 opinion the evidence of many of the proponents of the plan approved by the court below seems fraught with unreality. Though the affidavit of Superintendent Miller of June 10, 1959, stated that the number of Negro children who registered for admission at the Fall term 1959 to the first grades as shown by Exhibit No. 11 was 25, we were not informed as to the number of Negro children who were admitted to the first grades at the Fall term 1959. There is nothing in the record which demonstrates the number of Negro children who registered for admission to the first grades at the commencement of the school year 1960. These facts could have been easily supplied to the court below by affidavit and certified to this court even after the appeals were taken. Neither the State Board of Education, the State Superintendent of Public Instruction, nor any of the defendants, insofar as the record shows, have attempted by conducting a registration or by any other means, to bring upon the record the very pertinent fact as to the number of Negro children who actually presently seek integration into grades of the public school system of Delaware. We think that the defendants are reluctant to face the facts, to grasp firmly the nettle that the integration of school systems presents in Delaware and elsewhere. The defendants have evolved the minimum state-wide plan and desire to adhere to it. It is indeed a psychologically tempting one but we think that the hazard involved in integrating at the Fall term 1961 all those Negro children who may then seek integration is largely a mental one. It is for these reasons that we will direct the court below to order the State Board of Education and the State Superin-

tendent of Public Instruction to prepare a plan which will provide for the integration at the Fall term 1961 of all Negro school children who then seek integration. Such a plan can be effective, of course, only if it be worked out with the aid of the Local Boards. Such aid must be forthcoming or it will be required by order of court. But as we pointed out in our original opinion in these cases, 256 F. 2d 688, 693 (1958), it is the duty of the State Board of Education to maintain a "uniform, equal and effective system of public schools throughout the State . . .", 14 Del. C. Section 141. It follows that the primary responsibility for the preparation of the plan which will be required by our judgments must rest on the members of the State Board of Public Education and the State Superintendent of Public Instruction. This is the reason why that primary duty is imposed on them by our decision.

It is obvious that in the years to come more and more Negro children will seek integration into the public schools of Delaware and that this desire must be implemented in accordance with the decisions of the Supreme Court in Brown v. Board of Education, of Topeka, 347 U. S. 483 (1954) and 349 U. S. 294 (1955). As time passes and the number of Negro school children seeking integration increases, modifications and enlargements of school facilities will be required. The State Board of Education, the State Superintendent of Public Instruction and the Local Boards can effect such changes and modifications as may be required with the approval of the court below.[1] Eventually a wholly integrated school system will be effected for Delaware: "wholly integrated" in the sense that all school children, whether white or Negro, whose attendance at school is required by law at public schools, 14 Del. C. Section 2702, will attend public schools without regard for race or color.[2] The integration to be provided for by the

1. The court below will retain jurisdiction and any plan approved may be modified by its order from time to time.

2. We point out that there are now in Delaware a sufficient number of public schools, white and Negro to accommodate all the school

plan to be submitted to the court below for its approval as its first essential element must provide for the integration of all Negro school children who desire integration at the Fall term 1961. As its second essential element the plan to be submitted must contain adequate provision for the integration of the ever increasing number of Negro school children who will seek integration in the school years following 1961. This second element of the plan, if it is to be consummated, will necessitate the making of immediate estimates as to future school facilities. The making of such estimates is not a simple matter. Their creation will require the exercise of energy, skill, patience, and creative adaptability by the public school authorities, and, as we have indicated, funds to be appropriated by the General Assembly of Delaware. The duty imposed on the State Board of Education in this respect is as clear as is the responsibility confided to this court and to the court below to make certain that the mandate of the Supreme Court is carried out. If the school authorities do their part and the corresponding duty placed on the people of Delaware by their civic conscience is not met by action of the General Assembly, the public school authorities will at least have the satisfaction of knowing that they have done their duty as the law requires.

We are aware that strong courts have held in substance that a grade-by-grade integration of the kind approved by the court below has met the criteria laid down by the Supreme Court in its decisions in Brown v. Board of Education of Topeka, *supra*. Such a ruling, as some of the petitioners point out, is contained in the decision of the Court of Appeals for the Sixth Circuit in

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children of Delaware. Total integration would be possible by using all present schools and employing all present teachers. The reason why such a plan is not presently ordered is because some Negro schools are substantially inferior to the corresponding white schools. See the opinion of the Supreme Court of Delaware in Gebhart v. Belton, 91 A. 2d 137 (1952). See also Article X of the Constitution of Delaware.

Kelley v. Board of Education of The City of Nashville, 270 F. 2d 209 (1959), *cert. den.* 361 U. S. 924 (1959).[3] But the all-important issues of integration "with all deliberate speed" and what constitutes a "reasonable start towards full compliance" with the ruling of the Supreme Court as required by its Brown decision of May 17, 1954, *supra*, 347 U. S. 483, can be decided properly only on due consideration of all the pertinent factors and circumstances. The first of the circumstances militating against our sanctioning of the plan approved by the court below is, as we have reiterated, that of the 6813 Negro school children shown as available for integration by Exhibit No. 11, only 25, as demonstrated by the record, registered for admission to the first grades for the Fall term 1959. We point out that assuming that an equal number of Negro school children registered for admission to the first grades for the Fall term 1960, it would follow that less than 1% of the Negro school children available for integration will have been integrated by the Fall term 1960. The fact that the conclusion made by us in our opinion of July 19 as to the number of Negro school children who presently desire integration has not been seriously contravened by those who are in the best position to do so is very significant. The number of Negro school children who will be admitted to the Delaware public school system by the Fall term 1961[4] under the plan approved by the court below is minisculc. Indeed the number of Negro school children integrated at the end of five years might be as large as 125 or 1.8% of 6813 Negro school children shown as available by Exhibit No. 11. Second, if our conclusion as to

3. Denial of *certiorari* by the Supreme Court does not signify approval or disapproval of the decision of the court below. See the opinion of Mr. Justice Frankfurter in Maryland v. Baltimore Radio Show, Inc., 338 U. S. 912, 917-919 (1950).

4. That number, of course, will comprise the Negro school children newly integrated in the first grades at the Fall term 1960 plus those Negro school children, who, integrated at the Fall term 1959, have been promoted to the second grades in 1961.

the limited number of Negro school children who will seek integration at all grades at the Fall term 1961 is correct and that number will not substantially exceed 500, such full integration could be accomplished without too great difficulty. Third, as we have stated, the plan as approved by the court below will completely deprive the infant plaintiffs, and all those in like position, of any chance whatever of integrated education, their constitutional right. Fourth, the plan approved by the court below goes no further than a grade-by-grade integration beginning at the first grades and can provide integration only for Negro children presently of very tender years, excluding all others. Fifth, the circumstances of Kelley v. The Board of Education of Nashville, *supra*, are not analogous to those at bar. The number of Negro children involved in the Nashville schools was substantially larger than the number with which we are concerned in the cases at bar. Nashville is a city of approximately 173,000 persons, of whom more than 28% are classified as Negroes. Many of the School Districts and High School areas of Delaware with which we are concerned are in rural or semi-rural areas and the number of presently segregated Negro school children involved in the whole of Delaware is much less than the number involved at Nashville. Integration problems are more difficult of solution in heavily populated urban areas. Moreover the City of Nashville lies in the deep South, a part of our Nation where emotional reactions concerning school integration are more intense than in our own State of Delaware. We think that the Court of Appeals for the Sixth Circuit had this fact in mind when it formulated its decision in the Nashville case. Several United States courts also in the South have ordered grade-by-grade integration of the sort approved by the court below where Boards of Education have taken either no steps toward integration or have made but small advances in that direction.[5]

5. See for example Bush v. Orleans Parish School Board No. 3630, Civil Action Eastern District of Louisiana, decided without

In short, integration in the State of Delaware, which already has integrated many of its schools, particularly in the Wilmington metropolitan area, should not be viewed, gauged or judged by the more restrictive standards reasonably applicable to communities which have not advanced as far upon the road toward full integration as has Delaware. To apply such standards to the Delaware school system is not permissible in the light of the Supreme Court's mandate that state school systems shall proceed to full integration with all deliberate speed and that each state school system shall make a reasonable start toward full compliance. In Brown v. School Board of Topeka, *supra*, 349 U. S. at p. 300, Mr. Chief Justice Warren stated: "At stake is the personal interest of the plaintiffs [Negro school children] in admission to public schools *as soon as practicable* on a nondiscriminatory basis." (Emphasis added.) The court below and the defendants have overlooked this sentence and the effect which must be attributed to it. We reiterate our opinion that the plan approved by the court below does not meet the standards laid down by the Supreme Court and that the tests of all deliberate speed and a reasonable start toward full compliance, require on consideration of all the circumstances at bar, the formulation of a plan which will provide for the admission to integrated schools at the Fall term 1961 of all Negro school children who seek integration at that time. Such a result in our opinion is the "practicable" one.

In so concluding we point out again that we believe that the defendants have acted in good faith but good faith alone cannot solve their problem or our own. True the defendants must act in good faith to comply with the mandate of the Supreme Court, but they must do more than this. They must proceed to integration with all deliberate

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opinion, May 16, 1960; and Ross v. President of the Board of Trustees of the Houston Independent School District, No. 10,444 Civil Action, decided without opinion, August 4, 1960.

speed. Certainly in the plan approved by the court below the accent is on deliberation rather than speed. The defendants must also make a reasonable start toward full compliance. In the cases at bar the step toward full compliance about to be compelled is but a small one. It follows that the plan approved by the court below is not in accord with the legal principles enunciated by the Supreme Court. Mixed questions of fact and law are presented and we are free to review them. We conclude that the defendants, acting in their administrative capacities, have failed to exercise properly the discretion confided to them by the law. We are of the view, however, that the abuse of their discretion by the school authorities does not result from bad faith on their part, but has come to pass because they have approached this hard problem unrealistically and with too great a degree of caution.

It is obvious from the petitions for rehearing that some, at least, of the petitioning-appellees have not grasped the precise nature of our decision. In our opinion of July 19 we did not summarily order full integration of the Delaware School System at the Fall term 1961. We said that we would direct the entry of an order by the court below requiring the State Board of Education and the State Superintendent of Public Instruction to submit to the court below for its approval on or before December 1, 1960, "a modified plan which will provide for full integration of all grades of the public schools of Delaware commencing with the Fall term 1961". We did not state that we would direct the court below to order the interested Local School Boards to cooperate in the formulation of an integration plan. We assumed and we still assume that the court below will dispatch notices to the interested Local Boards calling them into a hearing on the merits of the modified plan when it is submitted. This is what the court below did following the receipt of our mandate based on our opinion handed down in 1958. The modified plan when submitted

may or may not meet with the approval of the court below. It may appear that our conclusion as to the comparatively small number of Negro school children who will seek integration in the various respective grades of the school system of Delaware at the Fall term 1961, is erroneous even though we are presently strongly of the contrary opinion. Such integration, *viz.*, of all Negro school children who seek integration, as indicated would constitute integration at all grades of the public school system of Delaware at the Fall term 1961. But the plan submitted to the court below must go further. It must provide also, if it is to meet with our approval, for a wholly integrated educational system of the kind we have indicated whereby, as the number of Negro school children who seek integrated education increases,[6] the integration of these Negro school children can be effected. We do not and cannot state detailed provisions of the plan. We reiterate that the primary duty to create the plan rests on the State Board of Education and on the State Superintendent of Public Instruction.

A further point is raised by one of the petitions for rehearing[7] which also requires clarification. We stated that we would direct the court below to order the individual defendants who are members of the Boards of Trustees or of the Boards of Education in the School Districts, named in the respective titles of these causes, to integrate into the public school system of Delaware, commencing with the Fall term of 1960, the individual infant plaintiffs who shall then actively seek integration. The defendants have construed the words referred to with complete literality. It was not our intention, nor is it our intention now, to exempt the respective individual infant plaintiffs

6. As it will increase as educational and sociological, as well as economic conditions improve for the Negroes of Delaware.

7. We refer to the petition for rehearing filed by the School Boards of Seaford, Laurel and Milford, and by the Board of Trustees of the Greenwood School.

who may presently actively seek integration from the usual processing of the school system relating to their capabilities, scholastic attainments and geographical locations, provided always that that processing is conducted on a racially non-discriminatory basis. Such processing must, of course, be applied to all children in a well-regulated public school system.

Another point raised by the same petition for rehearing is not entirely clear to us. The language used seems to suggest that in stating that we desire a plan which will provide for the integration of all grades of the public schools of Delaware we act without authority because in addition to the members of the State Board of Education and the State Superintendent of Public Instruction we have before us as parties defendant on this record only the members of the Local Boards of Trustees or of the Local Boards of Education named in the titles of these cases. It is true that there are many members of Local Boards presently governing segregated or partially segregated schools who are not parties to the instant record but we are not directing the court below to make any order respecting these individuals But as we have just stated we do have as parties defendant on the present record the members of the State Board of Education and the State Superintendent of Public Instruction and we will, as we have indicated, direct the court below to require these members to prepare a plan of the kind we have indicated. We think that our authority to do this is plain. The problem of integration in Delaware is not one which can be solved piecemeal. It requires thorough far-seeing over-all treatment by the central school authorities acting with the cooperation of the Local Boards. If a satisfactory modified plan be formulated and submitted to the court below and meets with approval, should the members of the Local Boards involved, not parties to the present record, fail to cooperate in the consummation of the plan, other steps must

be taken. We will not assume, however, that there will be a failure of cooperation unless it be made manifest.[8]

In view of the fact that more than a month has elapsed since the handing down of our opinion of July 19 the time for the submission of the plan to the court below is extended to December 31, 1960. The petitions for rehearing will be denied.

Judge Goodrich dissents.

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8. We take this occasion to point out, in connection with the foregoing, that the suits at bar as spurious class suits. See Independence Shares Corp. v. Deckert, 108 F. 2d 51, 55 (3 Cir. 1939), rev'd on other grounds, 311 U. S. 282 (1940), and National Hairdressers' & C. Ass'n. v. Philad Co., 41 F. Supp. 701, 707-9 (D. C. Del. 1941), aff'd 129 F. 2d 1020 (1942).

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

AMENDED JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court in these cases be, and the same are hereby vacated, with costs, and the causes remanded to the District Court with directions to:

(1) order the individual defendants, respectively members of the Boards of Trustees or of the Boards of Education of the School Districts as named above, to integrate, commencing with the Fall Term 1960, the respective individual infant plaintiffs who presently actively seek integration, subject, however, to the usual processing of the school system relating to their capabilities, scholastic attainments, and geographical locations; providing nonetheless that that processing is conducted on a racially nondiscriminatory basis as set out in the opinion filed concurrently with this judgment;

(2) enter an order requiring the members of the State Board of Education of Delaware and the State Superintendent of Public Instruction to submit on or before December 31, 1960 for the approval of the District Court a modified plan of integration which will provide

a. for the integration at all grades of the public school system of Delaware, at the Fall Term 1961, and at all subsequent school terms, of all Negro school children who desire integration subject, however, to the usual processing of the school system relating to their capabilities, scholastic attainments, and geographical locations, providing nonetheless that that processing is conducted on a racially nondiscriminatory basis as set out in the opinion filed concurrently with this judgment;

b. for a "wholly integrated" school system, as that term is employed in the opinion filed concurrently with this judgment and as provided in the opinion, whereby adequate wholly integrated school facilities at all grades of the public schools of Delaware shall be provided for all school children, white and Negro, whose attendance at public schools is required by law, subject, however, to the usual processing of the school system relating to their capabilities, scholastic attainments and geographical locations, providing nonetheless that that processing is conducted on a racially non-discriminatory basis as set out in the opinion filed concurrently with this judgment;

(3) enter an order requiring that, except as hereinbefore provided with respect to the individual infant plaintiffs, who shall seek to be integrated at the Fall Term, 1960, the continuation of the grade-by-grade integration presently in effect and approved by the District Court until the modified plan to the extent provided in paragraph 2(a) of this judgment and as contemplated in the opinion filed concurrently herewith, be put in operation.

Dated: August 29, 1960

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.